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The Planning Forum Series is designed to place before decision-makers in government and the private sector innovative ideas, explorations, case studies and discussions related to improving the development of policy and the making of decisions in the land use planning field. Since the purpose of the Series is to stimulate, to contribute to the free exchange of ideas, reports may cover a broad — and sometimes unconventional — range of philosophies and approaches.

Publication in the Series does not, therefore, imply support by the Editor, the Department of Municipal Affairs, or any other agency of the Provincial Government. The views expressed are solely those of the author.

MEDIATION AND ARBITRATION OF PLANNING AND MUNICIPAL DISPUTES

Proceedings of a Seminar on an Alternative for Dispute Resolution

April 19-20, 1982
Faculty of Extension
University of Alberta
Edmonton

by

ALBERTA ARBITRATION AND MEDIATION SOCIETY

The Planning Forum Series
1
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Inter-Agency Planning Branch
Alberta Municipal Affairs

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FOREWORD

Mediation and arbitration have been used formally and informally for centuries, as a means of settling disputes without recourse to the courts. Long familiar in the fields of labour-management and internation disputes, they have now gained popularity in settling community disputes, marital disharmonies and, rather more recently, environmental and planning conflicts.

Their use in Canada, outside the labour management field, has been rare. Most of the examples that can be pointed to are from the United States, with the exception of the recently established municipal boundary secretariat in Ontario. Notwithstanding the lack of Canadian experience with these techniques, there has of late been a growing interest in finding alternatives to costly and lengthy disputes over such matters as annexation, metropolitan development, urban growth in rural areas, and so forth. Nowhere perhaps as much as in Alberta, which recently witnessed protracted annexation proceedings costing many millions of dollars.

Under the sponsorship of the Alberta Arbitration and Mediation Society, a two day seminar was held on April 19 and 20, 1982 to bring together outside experts familiar with mediation in planning and municipal contexts, to share their experiences with municipal decisionmakers and planners from across Alberta. The principal aim of the seminar was to explore alternatives to dispute resolution and to determine whether they would be useful in the Alberta context.

The discussion revealed considerable interest in mediation as a means of resolving local conflicts. It was seen as far preferable for locally elected people to work through their differences locally, achieving a result both parties could live with, rather than to take them to the courts or a Provincial Government body lacking in local knowledge and accountability, and risk a decision no one would really be happy with. The principle of self-determination for the parties in a conflict was espoused by virtually all participants.

The discussions revealed areas of concern, however. Finding an appropriate mechanism was seen as key, but there was ambiguity as to the role of the Provincial Government, beyond its establishment of permissive legislation which would allow mediation in the planning and municipal arena. These difficulties were not, in general, allowed to alter the almost unanimous support the concept received, and the optimism felt by the participants that "this was an idea whose time had come."

This report on the use of mediation and arbitration is the first in the Planning Forum Series of publications. The series is designed to bring innovative ideas and concepts related to the land use planning field to a wide audience of decision-makers in Alberta, so as to stimulate discussion aimed at improvement, where necessary. It is therefore fitting that the first issue should deal with something as innovative and yet relevant as mediation, and also give recognition to the newly-formed Alberta Arbitration and Mediation Society. The staff of Inter-Agecny Planning Branch are pleased to have been able to support the efforts of the Society in this ground-breaking seminar, and in the preparation of this report, and hope that readers will find the results both stimulating and useful.

Graham Murchie
Editor

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MEDIATION AND ARBITRATION OF PLANNING AND MUNICIPAL DISPUTES

1. OPENING REMARKS

Introductory Comments by Merril McDonald
Faculty of Extension, University of Alberta

Good morning, ladies and gentlemen, on behalf of the Faculty of Extension, I would like to welcome you to the first of, I hope, many programs on the subject of mediation and arbitration. My name is Merril McDonald and I am your host while you are on campus, at the Faculty of Extension. The Faculty is very pleased to be able to work with the Alberta Arbitration and Mediation Society in putting on this program. We have been responsible for some of the housekeeping chores; the real work has been done by David Elliott and Roger Sturtevant of the Society.

I just want to provide a few administrative details and then I am going to turn it over to David.

David Elliott, Alberta Arbitration and
Mediation Society

Good morning ladies and gentlemen. My name is David Elliott. Roger Sturtevant and I are responsible for getting you here together today. When I left this morning my wife asked me if I felt nervous. I said, "no, not really" and at 8:15 Les Miller phoned me and said "give me some directions as to where the Corbett Hall is in relation to the Jubilee Auditorium". I told him it was northeast and, in fact, it is due south! you can see that I am really on top of things this morning!

It is my privilege to introduce to you Mr. Archie Grover who has kindly agreed to open this seminar for us. Archie has been supportive in both his encouragement for us to put on this seminar and in providing funding assistance to bring in the speakers. I am going to have a fair bit more to say later but for now I would just like to ask you to welcome Archie Grover.

Archie Grover, Deputy Minister
of Municipal Affairs (Alberta)

Thank you very much David. At the outset, I would like to say that it is a pleasure for me to be here this morning to represent the Department of Municipal Affairs and to kick off this seminar. On the program it says that the Honourable Marvin Moore would be here. I am not Mr. Moore! I have been asked by him, however, to bring to you his regrets that he is unable to be here this morning. He has asked me to express to you his wishes for a most successful learning experience at this, the first of its kind, in Alberta.

It was in the Spring of 1979 when Bill Isbister, the Chairman of the Alberta Planning Board, and former Deputy Minister of Municipal Affairs, was addressing the Alberta Planning Board at their annual conference in Jasper that he suggested that perhaps there should be some mechanism by which it would be possible to settle disputes, planning disputes, outside of the courts. David Elliott was at that seminar and he took up the challenge.

He subsequently contacted Bill and outlined a process of mediation and arbitration which could provide an alternative to resolution of planning disputes other than through the courts. Since that time he and Roger Sturtevant have been working away to establish the Alberta Arbitration and Mediation Society, a non-profit organization. The object of which, I am sure, you will be aware of by the end of this session.

The great advantage, as I see it, to a system of mediation and arbitration as advanced by the Society is that it is a technique which can be used to resolve issues before issues actually become disputes. Certainly, it can only happen if the parties to the dispute want it to happen, because it is a voluntary thing and, as such, the resolution of differences has a much greater chance of success than if an arbitrator was forced upon those parties involved. Potential activities of the AAMS, outlined by David, include inter-municipal issues and disputes, municipal-regional planning commission issues and disputes, mediation in sub-division approvals and the appeal process, and mediation and arbitration of conditions related to Alberta Planning Board decisions.

This list in itself is not exhaustive, and I am sure other differences, not only in the planning process, but territorial differences such as annexation proposals, can often get out of hand and create great mistrust between municipalities. We do hope, however, that the 1980 change to the Municipal Government Act respecting annexation --- annexation applications may only now be made by municipal authorities not citizens or developers, will cut down on the number of applications that go to the Local Authorities Board and, as well, will cut down on disputes between municipal jurisdictions.

There was also an amendment to the Planning Act recently which provided for adjacent or adjoining municipalities to submit disputes to the Alberta Planning Board for resolution. These two processes are fairly new, so it is too early to judge their success, but there have been a number of submissions to the Planning Board to consider.

However, in the eyes of many of the elected municipal people, there seems to be developing an adversary relationship between themselves and the Planning Board, which seems to be related to the subdivision appeal process that the Planning Board is involved in as the appeal authority. It seems that every municipal meeting that you attend where planning matters are discussed, the matter of decisions with respect to the subdivision appeals, as rendered by the Alberta Planning Board is brought up for discussion. And I think now, more than ever before, that there are more disputes between rural and urban municipalities. The large number of these disputes emanate from planning problems of one sort of another.

In the Legislature on Friday afternoon, when I was in attendance, the Member from Red Deer stood up on the floor and brought up the dispute that currently exists between the City of Red Deer and the County of Red Deer relative to industrial parks being developed in the County, and the permitted uses that are allowed in these parks.

When David and Roger came to visit me last Fall to discuss the putting on of this seminar they informed me of the aims and objectives of the Alberta Arbitration and Mediation Society, I advised them of a conflict that I saw developing in the Lethbridge area between the City of Lethbridge and the County of Lethbridge. This particular situation seemed to be just gathering momentum, dealing with an annexation that the City was in the process of undertaking. I suggested to them that perhaps there might be some advantage approaching both those municipalities to see if there wasn't something the Society could do in the way of a mediation or arbitration to settle the conflict which seemed to be developing. I am not sure what part they played in the resolution of the situation down there; however, I have learned recently that the County and the City have nearly finalized a mutual agreement relative to the sharing of revenues for those properties that are to be annexed.

Dave and Roger have put together a very interesting seminar; they have brought in speakers from outside the Province who will undoubtedly share their experiences with you. I know one of them, a friend from Ontario, Gardner Church, will be speaking to you later and telling you about the situation in Ontario.

I am pleased that the Department of Municipal Affairs has had an opportunity to play a part in this seminar and let me leave you with this parting thought:
"Any fool can criticize, condemn and complain...
and most of them do!"

Thank you very much.

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2. OVERVIEW STATEMENTS ON THE APPLICATION OF ARBITRATION AND MEDIATION IN MUNICIPAL AND PLANNING DISPUTES

David Elliott, Alberta Arbitration and Mediation Society

Each time I participate in a seminar, either as an organizer or participant, I find I learn in two ways, one obviously by listening and questionning the speakers but secondly, and perhaps more importantly, by meeting other participants at the seminar and talking over problems with them.

Attendees

We have here today a unique mix of people representing virtually every facet of municipal and planning operations and I particularly encourage you to come to know your neighbours. Perhaps we could start by you introducing yourselves to your immediate neighbours, and those in front of and behind you, as a start to getting to know each other.

Seminar History

My particular interest in mediation and arbitration as they might be applied to planning and municipal disputes was, as Archie Grover indicated, stimulated by comments Bill Isbister made in 1979. When he made those comments I was reminded of some work that I had been involved with in the early seventies related to labor mediation. Time didn't really permit me to develop the idea much in 1979 or 1980, but I kept my eyes open for little articles in the press and I discussed the idea with a number of different people.

Ontario Mediation

I found someone who was particularly interested in the idea, in Roger Sturtevant, and we generally developed our own ideas about how mediation and arbitration might be applied to planning disputes. The more we looked, the more we found and our research led us to Gardner Church, Michael Fenn and Brian Issacs in Ontario and their resolution in a very different way of boundary disputes in Ontario. These disputes had previously become extremely bitter and, as I am sure they will tell you, went up and down to the Supreme Court of Canada without really resolving anything.

Institute for Environmental Mediation

Roger's visit to Seattle led him to Gerald Cormick and Verne Huser of the Institute for Environmental Mediation. After contact with them we knew they had an awful lot that we would like to hear about and an awful lot we could learn. We tried then to think of a way in which we could pull these various ideas together and test them on people who would be able to judge whether the concept of mediation and arbitration, as it related to planning, could be applied to Alberta. We came up with the idea of this seminar as being a good way of doing that. We didn't just want to open the doors and invite just anyone who wanted to come; we were looking for people who would be able to judge this process with some background knowledge. As most of you know, we wrote letters to the various planning agencies, municipal governments and other major agencies in Alberta asking each of them to nominate at least three people to whom they would turn if they were in dispute and were looking for a mediator to help them out. From those letters we got a number of replies. You here today are the replies, the nominees of people throughout Alberta.

Seminar Participants

Overview

Let me briefly try and tell what I think today and tomorrow is all about. I start from the premise that a dispute is inevitably time consuming, costly and often publicly embarrassing, with a drain on physical and mental resources. I think men and women of goodwill generally want to resolve their differences. Yet, the ways in which disputes can be resolved seem to be pretty limited and usually the decision that is made in a dispute is made by a third party; that is, the parties in dispute lay their problems before someone else and that someone else makes the decision.

So the decision making is taken out of the hands of the parties in dispute and given to a third party; this is arbitration, and is the way the courts work. Each side presents evidence and the judge makes the decision. What I was hearing was that there was a need for an option, another option, whereby parties in dispute could resolve their problems themselves. This is what these next two days are about, that other option.

it is going to be presented in a number of different ways, and while we billed this seminar as dealing with "mediation and arbitration" the more we have learned in the last three months, the more we have come to learn that trying to cover mediation and arbitration in two days is absolutely impossible; consequently, the next two days are going to be concentrating more on mediation, which is particularly new to Alberta in a formal sense. We hope that from the various speakers you will get a feeling of how the concept could be used in Alberta, and you will be able to tell us whether it is something that is worth pursuing for Alberta or not. We also hope to show how arbitration can be plugged into a mediation concept, but in the main, we are going to lean more towards how mediation might be used to resolve disputes.

Mediation Defined

I want to take a couple of moments to define my terms a little more clearly. You will hear from the speakers their own definitions and they have considerably more experience in what these terms actually mean than I. When I speak of mediation I mean a process by which two or more parties agree that another independent person should help the parties in dispute, resolve their differences. The mediator is the lubricant, the cushion to absorb extreme positions, a catalyst for new ideas; but the final decision is in the hands of the parties in dispute. They ultimately say "yes, we like this agreement, this compromise", or "no, we don't, and we will go our separate ways". The final decision at that stage, at least, is in the hands of the parties.

Arbitration Defined

Arbitration is quite different. Arbitration is the process whereby a third party, chosen by the parties to the dispute, makes a decision, in much the same way as the Alberta Planning Board makes a decision on a subdivision appeal, or the Local Authorities Board makes a decision on annexation, or a judge in a court makes a decision.

There are some differences between arbitration in the pure sense, where the parties in dispute choose their arbitrator, and the case where you will get an arbitration under the Planning Act, for example. The Alberta Planning Board provides some form of arbitration in that it makes a decision, but it is not chosen by the parties. It is, in fact, imposed by law which means that there is not quite the same degree of choice involved. So the vital difference between mediation and arbitration is that in mediation the parties have control over their own destinies, at least to the point of deciding whether to accept or reject a proposed settlement. In arbitration, the destiny of the parties in dispute is put in the hands of another person who is selected by the parties in dispute to make the decision. There are many times when that may be the best route to go.

Seminar Objectives

Here we are going to be talking mainly about the first option of mediation. As I see it, our objectives in the seminar are these:

1. First, to obtain a judgment from you as to whether the concept of mediation and arbitration of disputes is appropriate for Alberta, in the planning and municipal context.
2. If the concept is appropriate, to give us some ideas on the best way to deliver the concept to the people who might wish to make use of it.
3. If the concept is appropriate, to start to outline some action that should be taken in the future.
4. To obtain a tentative list of people who might be willing to participate as mediators in a training pilot and pilot projects, and to obtain the names of people who might be willing to assist in the development of the idea in Alberta.

Tomorrow morning we hope to present to you an outline of the way Roger and I envisage this process might be developed. In doing that we are going to use your ideas from today, and the ideas we have read about from Ontario and Seattle, and that we will hear more about today.

Roger Sturtevant, AAMS, Introducing
Gerald Cormick, Institute for
Environmental Mediation

Briefly, Gerald Cormick is a comedian. He knows an awful lot about mediation and has taught at various universities in Canada and the United States, including the University of New Brunswick, the University of Washington in St. Louis, University of Washington in Washington State, Hunter College in New York, and the University of Michigan. Gerald has a doctorate in Business Administration and I think many of you will find that an interesting combination with respect to approaching environmental mediation. Gerald has been doing much of the fund raising for the Institute of Environmental Mediation, which is funded by the Ford Foundation, Rockerfeller Foundation and other agencies.

Gerald Cormick, Founder, Institute for
Environmental Mediation, Seattle

Skills of Mediator

You know I have been called a lot of things before; that happens to mediators. But I've never, never in my entire life been called a "lubricant" before. It conjures up a lot of different images, particularly with those parties who feel they didn't come out very well after negotiations.

Somebody asked me one time. "What does it take to be a great mediator", and I have often wondered about that. I know what it takes, because I know myself, and you can see by just looking what it takes to be a good mediator. Beyond that, I remember reading something that a great British actor wrote one time about what it takes to be a great actor. He said that an aspiring young thespian had come up to him and asked, "Sir, "how do you get to be a great actor?" and he said, "what it takes is absolute credibility, integrity and honesty, and once you have learned to fake that, the rest comes easy!"

Institute's Varied Experience

As David suggested, as we were talking last night we began to realize that we were coming at the problem and topic here from somewhat different directions, and since I got to go first, I get to steal Gardner's line. One of the things Gardner said that makes terrific sense was that they (in Ontario) had a problem looking for a process, whereas Verne and I came from the perspective of having a process looking for a problem. I think as we go through today and tomorrow that is going to be one of the things that is very evident. Verne and I practice mediation; we may or may not deal with problems that have to do with government boundaries, municipalities and so on, but we practice mediation. We mediate labour disputes, mediate racial and ethnic disputes, inter-personal disputes between neighbours; a whole lot of different things. My expertise happens to be, to the extent that I have one, mediation; what we are hoping to do today is talk about how we have used mediation and the kinds of situations we have used it in, in the hope that you who are familiar with the particular situations in Alberta can go from there to see whether or not something like we do might be applicable.

Some of the kinds of disputes which have used mediation, include inter-governmental disputes (for example, a highway dispute which has been going on for 10 years, between three cities, a County, the State Government and the Metropolitan Authority in charge of transit; or between a tribal government, and a county or state government; situations where you have a lot of sovereignty issues, or disputes that involved different agencies and elected officials). They have different kinds of authority and responsibility. So we have been involved in things of that sort, having to do with zoning and planning and allocation of where development will and will not go, in an estuary; and so on.

Verne will talk about that sort of things: involving citizens groups, and power groups in government, such as a group of farmers that got themselves an attorney and took local government to court because of flood control and zoning and so on. There are very different kinds of disputes, where the parties are really not equal in the sense of responsibility, and accountability.

What we would like to do today is to share with you some of the kinds of things we have done, and you can share with us some of the problems you are facing, and perhaps between us we can come up with all of the answers. Which isn't bad in a day and a half. Thank you.

Gardner Church, Executive Director, Finance and Administration, Ministry of Municipal Affairs and Housing (Ontario)

It is with some trepidation that I stand here following Gerry, who I learned last night was a master of a pun. The experience we are going to be speaking to you about is really fairly straight forward. It is not essentially a mediation exercise, although I guess through the development of the process, it became obvious that mediation skills were going to be very important.

Ontario Experience

The essence of what we tried to do was to find an alternative to a 75 year old process that was becoming impossible. Quite specifically, the municipalities in Ontario, of which there were about 150 urban municipalities, had over a period of about 20 or 30 years become very much enmeshed in adversary battles over annexation. It had gotten to the point, for example, that in the City of Barrie (which has a population of about 30 thousand people) an annexation case has managed to go through (I think) 9 different courts and 3 different hearings, without being resolved.

That was obviously an extreme, but we were finding that lawyers, consultants and judges were having a great deal more influence on the structure and fabric of the local government system in Ontario then were elected politicians. It seemed to not only the government but the municipal people themselves, that such a vital issue as the structure of the municipal system should be subject more to the input and the decision making of elected representatives. For a number of years the province accepted that burden and made a number of very unpopular decisions in relation to municipal boundaries.

Where the province essentially said "we are going to take the determination, rather than leaving it to somebody else",that process quite naturally couldn't go very far before the Province became as unpopular as the judges had previously, and for a while we were really stuck in a situation in which there was no reasonable method available to handle these boundary problems. And as so often happens with these things the impetous for coming up with a new approach came --- not from the province, or the judges and consultants and lawyers --- but rather from the municipal politicians themselves.

The Association of Municipalities of Ontario combined with the Rural Ontario Municipal Association,managed to come up with an outline of a proposal that essentially looked like a mediation exercise and suggested that the Province of Ontario put it in place to deal with boundary disputes. Mike Venne will be giving you a slide show this afternoon that describes in some detail what we have come up with; it is now a fairly intricate process, it's institutionalized , with its own Act, and two or three of its own chief negotiators. It has a lot of bells and whistles, if you like, attached to the process that Gerry and Verne certainly won't see as being legitimate to a mediation exercise: there are a lot of fairly draconian measures available to the government in the event that one party or the other shows bad faith, or satisfies the government that it isn't trying to reach an agreement.

The process is designed with the assumption that agreement for the sake of agreement is a good thing in boundary disputes. I think that is a highly questionable tenet and something that we should look at fairly carefully this afternoon. I am fairly happy with the process but I think there are aspects of it that you should consider very closely before adopting here in Alberta.

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3. MEDIATION AS A DECISION-MAKING PROCESS
by Verne Huser, Institute of Environmental Mediation, Seattle

Roger Sturtevant, AAMS Introducing
Verne Huser, Institute for Environment Mediation

Verne Huser joined the Institute for Environmental Mediation in 1977 and has had more than a decade of experience in trying to resolve environmental issues, as a teacher, writer and consultant. Since joining the Institute, he has successfully mediated disputes involving such diverse issues as: port and airport expansion and development, in both Oregon and Washington; and land acquistion and access and development of public parks, in California and Washington. The parties have included Indian tribes, county and city governments, state and federal agencies, homeowner groups and citizen organizations; as well as elected and appointed officials.

He has also developed training programs and materials for a number of seminars and workshops on conflict resolution, negotiations and environmental mediation. He has taught courses in American environmental history and environmental conflict resolution at the Universities of Utah and Washington. A former National Parks Service Ranger and Bureau of Land Management, State Advisory Board Member in Utah, Verne was the first executive director of the Utah Environment Center and for several years an environmental communications specialist with Kennicott Copper Corporation.

He spent a Fullbright year teaching in Greece and has served as a study tour leader for the Smithonian Associates and teaches an annual course at the Grand Teton Environmental Education Centre in Jackson Hole, Wyoming.

Verne Huser on Mediation as a Decision-Making Process

Ideas on Mediation

I might just share with you a few ideas that other people have had concerning mediation, and other decision-making processes. Steven Solomon, writing in Fortune Magazine in 1979 said, in an article entitled "Business Like Ways to Resolve Legal Disputes" that it is better for businessmen to reach a settlement they can live with, than play roulette with a judge and jury.

Bill Riley of the Conservation Foundation, speaking of mediation, says it establishes a single forum in which many divergent interests, each initially accepted as legitimate, participate in seeking consensus. Recent success indicates that the techniques can play a major role in resolving environmental disputes, especially those involving the use of land.

There are many ways to settle disputes. It is interesting to me as a mediator to watch what is going on in the Falklands right now. If we go to war, the generals make the decisons; if we go to court, the judges make the decisons. If you go through most governmental processes, the bureaucrats make the decisions; if we go through the legislative bodies, elected or appointed representatives make the decisons. If we try mediation, the people most directly involved in the results make the decisons.

Difficulty With Courts

I am exploring a dispute along the Oregon coast right now, a dispute that grew into a legal battle. I asked both parties what issues needed to be addressed for them to be satisfied the dispute was resolved and a settlement had been found. They listed about 8 or 10 different issues, I said "how many of these issues are being addressed by the lawsuit". Virtually none of those issues were addressed in the lawsuit, so although they could have won a lawsuit, they would not have settled the problem.

History of Institute

Gerry mentioned earlier that in a sense we are a process looking for a problem and I am going to tell you a little about how our process works. First of all, I will tell you a little about who we are. Dr. Gerry Cormick, had a grant from the Ford and Rockefeller Foundations to spend a year in 1972 and 1973 looking at environmental disputes throughout the United States to see if the cost of the mediation might be appropriately defrayed. In 1974 he found a dispute in Washington State for which it appeared mediation might provide a solution. He and a colleague mediated that dispute, and then went on to set up the Office of Environmental Mediation at the University of Washington (funded by the Ford and Rockefeller Foundations). The Office remained there on campus at the University of Washington for about six and half years, with a variety of funding, including some state and Federal funding of grants and contracts.

A year and half ago we became a non-profit corporation, left the university setting, and with the same staff and the same funding, continued to provide the same services. We are now the Institute for Environmental Mediation in Seattle; we have five mediators there, a regional office in the Midwest; two mediators in Madison, Wisconsin; and a branch office in Southern California, with one mediator. Our funding at the present time comes from the Ford Foundation (no longer from the Rockefeller) and from the Richard K. Mellon Foundation, in Pittsburgh, and most recently from the Joyce Foundation in the Midwest. We have had a number of contracts with State and Federal governmental entities, one of the most aporopriate I think is what we call the Federal Regional Council, which is a body representing all the federal agencies in a particular region. With money coming in from several different entities, we contract with them to provide our services to explore disputes, to see if they are appropriate for mediation, and to design a process that will enable mediation to occur. But if we actually get into the formal negotiating stage, then we fall back on our Foundation funding so that no party to the dispute is in anyway paying for our services.

Recent Disputes

In the matter of what we do, I will give you a quick run down of the disputes that we mediated last year. There were five disputes mediated in four different states: two in California, one in Oregon, one in Washington, and one in Colorado. I was personally involved in the Veronies Park dispute, a long standing dispute in Northern California over access to, and development of a major park. This was settled when negotiators, representing the regional park district elected officials, local governments, elected officials and neighbourhoods most directly impacted by the type and location park development, and user interest, reached an agreement on a mutually acceptable development plan.

The Creek Sewer Lagoon dispute, a dispute in Washington State between a tribe, local government, private interests and federal agencies over arrangements for the protection of a sewer treatment facility. This was threatened with imminent destruction by a changing river course. The dispute was settled after a relatively brief period of intensive and difficult negotiations. Incidently, this is one of the few disputes settled without negotiating sessions. It was sort of shuttle diplomacy between and among parties, without their actually sitting together at the table.

The Homestake Pitch Mine dispute, which is detailed in your material, was a dispute between a mining company and a coalition of environmental groups which were involved in this agreement on the mine, later sued the mining company on issues relating to the mill, (in which the mined material is processed). It happened to be a uranium mine.

Resolving Disputes not Conflicts

One of the points we make is that we are attempting to resolve disputes, and not trying to resolve conflict. Conflicts are based on philosophical differences and different value systems. Although labour and management follow different philosophies, they can reach agreement and settle their differences with regard to certain issues. We try to settle disputes, not resolve conflicts.

The Ford dispute had to do with port development and resource protection in the estuary at the mouth of the Columbia River. In that particular dispute we had four local jurisdictions, (two towns, a county and port authority) at the negotiating table, four state agencies and four federal agencies and they reached agreement on what was appropriate development and appropriate resource protection in the estuary.

And finally, the Riverside Solid Waste Siting dispute. We had a contract with the California Solid Waste Management Board to provide our services to parties involved in disputes over the siting of sanitary land fills. We in fact gave a series of workshops in California, to parties involved in these issues, and eventually did mediate one dispute in Riverside. The mediation process led to another contract with the Solid Waste Management Board and for that reason, we have a California branch office.

Definition of Mediation

Now I would like to read to you the definition of mediation as our office applies it. This is a definition that Dr. Cormick has developed over the years and applied and clarified

> "Mediation is a volunatry process (you can't be forced into it) in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution."

Dr. Cormick has recently written an article that appeared in Resolve Magazine, which you also have in your materials, and which talks primarily about self-determination in environmental disputes.

We deal in total concensus, 100 per cent agreement. There are no minority reports; every party at the negotiating table has veto power, and every party is there because it wants to be there. Now there are ways in which parties can be encouraged to participate and that is sort of up to their constituencies. But there are reasons why the parties decide not to be involved in mediation; perhaps they want to set a legal precedent or there is a philosophical difference, as there often is in, lets say, nuclear disputes.

Nuclear Dispute

One of the environmental groups involved in the mining dispute we mediated last year was, in fact, an anti-nuclear group and the company was mining uranium. This anti-nuclear group said "there is no way we can be involved in this process because we are against nuclear power. The only thing we want is for you to leave that ore in the ground" and therefore they would not be involved in the process. The mining company, knowing that this one party was going to be opposing them, decided that it would be in their best interest to continue to try and negotiate with the other parties. Even though one of those parties opposed the mine, they tactically agreed they would not battle the other parties on this particular issue. So mediation did occur.

A Joint Process

Mediation is a joint process with the disputing parties together exploring the various issues dividing them. In this dispute I am now looking into on the Oregon coast, one of the parties came up with what they felt would be the appropriate pattern for negotiations. I had to point out to them that no one party dictates the terms of the negotiations, that negotiation is a joint process, and all parties have to be involved in creating that process. In a sense we bring the process to the dispute, but the process has to become the process of the parties or it cannot work.

Mediated Settlement

A mediated settlement is reached when all parties reach what they consider to be an appropriate settlement. Again there are no minority reports; nothing goes into the final agreement that is not agreed to by all parties, and again self-determination is the key note. The mediator has no authority; he simply serves as a catalyst.

I grew up in Texas, and when I talk about a catalyst in Texas, the people don't quite know how that fits the role of a mediator, because in Texas a catalyst is simply a rancher's inventory! I am not sure we are a catalyst, because technically a catalyst is not changed in the process and I think every mediator is changed through the mediation. In every dispute you mediate, you learn something; each dispute is unique. I think I need to say no more about that definition until we begin to apply it to some specific situation.

When to Use Mediation

When should mediation be used? Mediation is most appropriate at the point when the issues have been defined. The parties are visible, and highly involved, and there is some sense of urgency to settle the conflict. Again, our definitions have been emerging and this is an old line; we are now saying "settlement", rather than "resolution", as we define the process.

Levels of Conflict

There has been some suggestion today that some of you are looking for a process that will avoid conflict. We don't feel mediation is an avoidance of conflict technique; rather, mediation is appropriate towards the latter stages in the natural development of a conflict. At this point, some part of the process has focussed attention so that the issues have been clarified, the parties are relatively obvious, and there is an urgency to settle (as you normally don't find in the earlier stages).(Figure 1) There are generally two levels; let us say we are talking about solid waste management, everybody sort of agrees that we have got to have some place to put solid waste. There can be an agreement philosophically on the need for a solid waste facility, and perhaps in the way it is being handled. But once you are talking about a specific site, and it happens to be in your backyard, you suddenly don't want it there. You can agree philosophically on one level but at the site specific level you may have problems with it, so there are two levels of conflict that emerge. We feel that the site specific level is perhaps the most appropriate level for mediation.

FIGURE 1. WHEN SHOULD MEDIATION BE USED?

1. MEDIATION IS MOST APPROPRIATE AT THE POINT IN A DISPUTE WHEN THE ISSUES HAVE BEEN DEFINED. THE PARTIES ARE VISIBLE AND HIGHLY INVOLVED, AND THERE IS SOME SENSE OF URGENCY TO RESOLVE THE CONFLICT.

2. MEDIATION REQUIRES THE EXISTENCE OF A RELATIVE BALANCE OF POWER AMONG THE PARTIES. THE ABILITY OF EACH PARTY TO EXERCISE SOME SANCTION OVER THE OTHER IS NECESSARY TO ENSURE THAT ALL PARTIES WILL ENTER INTO THE NEGOTIATION PROCESS WITH "GOOD FAITH".

3. MEDIATION RESULTS IN COMPROMISES BEING MADE. THEREFORE, CERTAIN ISSUES OF PRINCIPLE OR LAW ARE NOT APPROPRIATE FOR MEDIATION.

4. MEDIATION IS APPROPRIATE IN SITUATIONS WHERE THERE ARE REASONABLE ASSURANCES THAT RESPONSIBLE AUTHORITIES WILL IMPLEMENT AN AGREEMENT REACHED BY THE DISPUTING PARTIES.

5. MEDIATION REQUIRES THE PARTICIPATION OF A MEDIATOR WHO OPERATES FROM AN IMPARTIAL BASE AND WHOSE PRIMARY ROLE IS TO PROMOTE AGREEMENT AMONG THE CONFLICTING PARTIES.

Balance of Power

Mediation requires the existence of a relative balance of power among the parties. Another thing that a mediator does is serve as a reality factor. The ability of each party to exercise some sanctions over others is necessary. We feel mediation is most appropriate when no party can take unilateral action, but in which each party has some sanction over other parties, and only through cooperative effort can they really find best solutions and settle the particular dispute at hand.

Mediation Inappropriate

Mediation results in compromises being made; therefore, certain issues of principle or law are not appropriate for mediation. If some party wants to set a legal precedent, mediation is not the way to go. If there are philosophical differences, perhaps mediation is inappropriate. In addition to compromise, sometimes creative new solutions come out of the mediation process; things that nobody brought to the negotiating table; things that simply emerge from the cooperative, creative approach.

Implementation Necessary

Mediation is appropriate in situations where there is reasonable assurance that responsible authorities will implement an agreement reached by the disputing parties. We are very careful not to allow ourselves to get involved in situations in which there is not much hope of the agreement being implemented. We use technical advisors to help guarantee that what is agreed to by the negotiators is something that is economically feasible, technologically possible, politically saleable and environmentally sound. And, finally, mediation requires the participation of a mediator who operates from an impartial base and whose primary role is to promote agreement among the conflicting parties.

When we talk about what individuals, groups, organizations and interests are presently involved in the controversy --- we frequently find that almost invariably the reasons people propose projects are technical, and economic, and the reason people oppose projects are social, and environmental. The proponents continue to generate technical information which does not answer the concerns of the opponents.

Mediation Process

I would like to talk now about the mediation process as we apply it. (Figure 2). Environmental mediation is somewhat different from mediation of labour-management disputes. In labour-management disputes you have only two parties; in environmental disputes you have many parties and one of the problems is determining who those parties are and who you have to have at the negotiating table. Getting back to our dispute to see if it is appropriate for mediation. We don't try to fit a dispute into mediation if it is simply not at an appropriate stage, or level of development.

Initial Contact Important

The initial contact may be rather critical. In one dispute I was exploring in California, three different parties contacted us sort of simultaneously; one of them was the National Parks Service; one of them was the regional local Park District and another one was the Eugene O'Neil National Historic site. Each of these three parties had contacted us simultaneously; each had something to gain by negotiation.

There was another element, the local homeowners who were not particularly interested in any negotiation because they were winning at that point. Why should they negotiate since they were already winning! We thought it was important who invited us to explore

Figure 2 THE MEDIATION PROCESS

the issue. If any one of the three parties who had something to gain had invited us in, we might be suspect. So we went to the local State Senator (we had had some contact with him before) and he was interested in getting this thing off his back. He wrote us a letter to see if we would explore this dispute. Well, some of the homeowners contacted that gentleman and said "why are you asking for mediation? Mediation is not necessarily in our best interest, why are you doing this". Well, he backed off, and told them that the National Park Service and the Park District asked us in and so our cover was blown. That particular dispute never got to mediation; it just wasn't appropriate because it wasn't in one of the party's best interest to negotiate. We frequently find that.

Citizen Activist Groups

I don't know whether you would find that so much here in Canada as we do in the United States, where we have a lot of very strong citizen activist groups. These can gain power and develop the kind of clout that puts someone on a level to be involved in a dispute. If they are gaining power by being involved in a conflict, they may not want to settle that conflict, since once the conflict is settled, they lose their power base. It is simply not in their best interest; they don't want to participate; and there is no mediation, because it is a voluntary process. So we explore a dispute to see if it is appropriate for mediation, and I will talk to you shortly about some of the questions that we ask people to ask themselves before they get involved in mediation, to determine if it is appropriate. So, if mediation is appropriate we then continue to design a process that will enable negotiations to occur.

In labour-management again you've got an existing framework in which negotiations can occur. In environmental disputes there is no framework; we have to create that framework, determine who the parties are,and perhaps who can represent these parties, or individuals; and what role they should play.

Negotiations

Normally there are two roles associated with the process: the negotiator is the person who makes trade-offs; and represents the various parties. The negotiators make the trade-offs, and sit at the table and negotiate. They have veto power and they sign the ultimate agreement. Then we have technical advisors that are there to help guarantee that the agreement is implementable. In one dispute we added a third party, called a Review Advisor, who would sit at the negotiating table and have veto power but would not sign the ultimate document. In doing so, they might have been seen to be giving up their decision-making authority somewhere down the line, in the permit process or what have you.

Designing the Framework

So, in designing the process, we determine who the parties are, what issues may be addressed, what form the ultimate agreement might take, and what kind of ratification process might be required in order for implementation to be more appropriately consumated. Where are you going to meet? When are you going to meet? ... the shape of the table; all these are important. All these process matters have to be clarified in order to enable negotiations to occur.

Formal Negotiations

The third step in the process is the formal negotiation stage. If we have been successful in designing a process and all the parties are included, then we move into formal negotiations. We are frequently asked how successful is our process; how successful are you? There are many ways to judge success. One of the ways we like to judge success is in the number of agreements which have been reached. We are still batting a thousand at that level; that is why we like to use it!

Agreement Achieved?

In every dispute in which we have reached the formal negotiation stage, we have helped the parties reach agreement. Sometimes we have gone so far as to design the process, and then at the last minute decided it simply wasn't going to work and therefore we withdraw our services. Sometimes we know it is going to lead to nowhere, and a lot of people are going to waste a lot of time and it is going to cause a lot of hard feelings, so we bow out. So at any one of these points we can say yes or no, or the parties can say yes or no. If we get into formal negotiations, theoretically an agreement is achieved. It may not be. Some day I am sure we are going to find one that doesn't reach that point, but so far we are batting a thousand.

Implementing Agreement

If an agreement is achieved, then we go into the implementation stage, and essentially we bow out at that point. If we have had the right parties involved, the appropriate technical advisors have been there, then implementation is a foregone conclusion and we simply bow out. Though we do make ourselves available to hold peoples' hands and listen to them commiserate about problems that arise, we normally try to develop some sort of ongoing mechanism that will enable the parties to continue to interact. In labour-management mediation, again you have got an ongoing relationship between the parties, and we try to create a similar kind of on-going relationship in environmental disputes. Now, lets go on to some of the questions that we ask the parties to ask themselves before they decide to opt for mediation.

Involving all Parties

Are all parties who have a stake in the outcome or who have the ability to influence implementation involved? If any party who can shoot the agreement out of the water somewhere down the line isn't involved in the process, then we don't think it is going to work. That is why it is a voluntary process; if any one party doesn't, for whatever reason, want to be involved in the process, it is probably not going to work.

Have all parties reached general agreement on the scope of the issues to be addressed? These first two questions primarily relate to the matter of designing the process.

What about those issues where there is an issue for only one party, where the other parties have said they are neutral on the issue? Yes, we discuss it but we don't really have too much to say on it, but if it is an issue for one of the parties, then we need to address it. So there is an agreement on all the issues.

Authority of Negotiators

Are the negotiators for each party able to speak for their constituents or for the constituency? We had a very interesting situation develop in the dispute we mediated between the Lumby Indian Tribe and Watkin County, Washington State, in which the Tribal Council members were negotiating for the tribe. The negotiators for the County were the appointed Parks Advisory Board. It was actually an administrative law process, with the County itself involved only through the Parks Department. So the Park Warden was negotiating for the County and the Indians came to this question and said: "can you deliver your constituency? Can you sell? Suppose we reach an agreement with you, the Advisory Board, can you sell that to the County Commissioners?" The only answer the Parks Board could give was, "well, we think so because in 14 years they have always supported us."

When, in fact, an agreement was reached, it was a two part agreement and the County commissioners did not buy option B. The final agreement was only on option A, which worked out alright, but the Indians were a little shocked by this. They said "you know we wouldn't have had the audacity to ask for option A if we hadn't worked through all the mess of option B". Having done that, they got everything they wanted and so the agreement was ultimately reached, but it did become a key point in that dispute.

There is reason to believe that if the negotiation group reaches an agreement, that agreement will be honoured by the group they represent. Again, we had a number of parties who were not at the table that were going to have to be involved in implementation. One of the State agencies kept saying, "look, help the parties reach an agreement and we will figure out a way to make it work", and ultimately they did.

Government Agencies

Are there reasonable assurances that effective government agencies will implement an agreement if it is reached? (This is in a sense an extension of the above. We are very careful to check this out with all the agencies that are involved in the implementation. When we were exploring the Crest dispute at the mouth of the Columbia River, we met with the Army Corps of Engineers who were involved in granting the ultimate permits that might grow out of this planning process. They took it very seriously, and said "O.K. we are going to consider this agreement in some detail at permit time" and it was interesting to me that the lowest man on the totem pole for the Army Corps of Engineers, a local representative, was at the negotiating table, yet the letter of endorsement (the final ratification letter) came from the top man in the Army Corps of Engineers at the regional level. So there was good communication within the Corps and the implementation was fairly well guaranteed.

Deadlines

Has a realistic deadline been set by the negotiators? In the Crest dispute, Crest, which was an amalgamation of local entities and local governments was going out of business on the 30th of June, so someone said that that would be a good time for us to use as a deadline. Everyone understood that they would get re-funded and that they would continue but thought this was a good time to set as a deadline. One of the county commissioners said, "look, if we go beyond that deadline I don't want to be involved in this process, I don't want to waste anymore time on it," so we set that as a very realistic deadline. And we actually reached an agreement an hour and a half before midnight on the 30th of June!

Has there been a public commitment by the immediate parties and the essential decison-makers to a good faith effort to reach and implement a consensual agreement? While the County Commission never said "yes, lets mediate" except sort of subtly to us, they did in fact select one of their number, one of the county commissioners, to negotiate for the County. That tacit approval of the process gave us the go ahead, and each party that was involved followed with their tacit approval.

Independence of Mediator

Does the mediator operate from a base which is clearly independent of the ultimate decision-makers involved in the conflict? Well, since we provide our services free, at no charge to the parties, we can retain a certain independence. The independence of the mediator is critical to the process and critical to that independence is who pays the mediator. If nobody pays us, then we can have a good degree of independence; fortunately, we have been able to continue to get funding to do these sorts of things.

Trusting Mediator

Do the parties trust the mediator to carry messages when appropriate and to honour confidential remarks? The confidentiality of the mediator has been tested in court, to a fairly limited extent, but it has been upheld. The mediator has confidential privilege and the matter of trusting the mediator is simply a matter of a mediator's working through all of this early stage process.

There are a number of roles that the agencies might play. Sometimes they are permit authorities, sometimes they have enforcement power, most of the time they are involved in implementation. They may set the boundaries within which the mediation can occur, they may pay the cost of the implementation and sometimes they are merely encouraging the parties to reach a settlement. Now one of the points we frequently make (I think Gerry will talk more about this later) relates to roles of these various agencies. Can a person or can an agency, that has permit authority, or enforcement power, serve as a mediator? Can it be independent enough to be a mediator trusted by all parties?

Do you have any questions at this point?

Question

Technical Studies

One of the things we ran into in Ontario was some difficulty in paying for technical studies that were required during mediation. We came to the conclusions that the best way was to agree on one technical route to do the study, and then do a single study. I understand in your case that the various parties do their own studies?

Answer

Well, actually by the time mediation is appropriate, in most of the disputes we have looked at, most of the technical information is in. One of the reasons we originally located at the University of Washington was to make use of the technical expertise that was available there at the University. After six and half years we found that we weren't using it, because its a political situation and even though you don't make decisions without facts, most of the facts were in. It was a matter of interpretation of the facts, and everybody can hire his own expert to prove this point or that point, and so it didn't make an awful lot of sense to have this technical expertise.

One of the other points we make is that the mediator himself does not need to be a technician. I am a river-runner in my spare time: I canoe; I run raft trips all over the West. If we ever got into a dispute relating to river-running issues (even though I know many of the parties, and they may trust me) I might start looking for answers and that's not the mediator's job. The mediator's job is to stick to process. We make no substantive decisions; too much technical expertise in an area may be so closely aligned to the issues, that he starts looking for answers, which is inappropriate for a mediator.

Time to Develop Process

Question

What is the relative length of time to develop and agree upon the process, as opposed to the substance of the decision on the negotiations?

Answer

In the Crest dispute we were asked, in 1977, to conduct a conflict resolution workshop for all those local entitites involved in the Crest planning process. It was an ongoing planning process, started in 1974, and we were asked to come in 1977 to conduct this conflict resolution workshop. I simply gave a half hour talk on the process and answered questions, and they cranked environmental mediation into their conflict resolution process, as a sort of last resort. Then they came up with their plan for the entire estuary and not only were the parties involved in that planning process familiar with our office and services, but we were familiar with some of the issues. Finally, in 1980, it was presented to the State Council that had to pass judgement on local plans and the State Council rejected those plans in its 136 page document.

At that point, for the first time mediation seemed appropriate. I began talking to the groups in December; in January and February I talked a little more, and it seemed that mediation was appropriate. So during the months of March and April (60 days roughly) we were able to design the process. We actually held two, two day process sessions for the 12 different entities. In a matter of 60 days we actually designed a process. In another 60 days (May and June) we went through 5 two day negotiating sessions and came up with an agreement at the end of that last session. So 60 days in designing the process and 60 days in going through the negotiations in a very complex situation.

In the dispute between Watkin County and the Lumby Indian Tribe, the final appeal in this administrative appeals process was on the Secretary of Interior's desk, (Cecil Andrews in the Carter administration) and he asked if there was any way that a negotiated agreement could be worked out. We explored that for about 3 months, and determined that mediation might work, and then he gave us a 60 day window, a 60 day block of time in which to help the parties to negotiate.

We were able, with a one two-week extension, to help the parties reach an agreement.

There were some very realistic deadlines in that one, by the way, not only was there the 60 day deadline that the Secretary of Interior had imposed, but 7 of the 11 members of the Lumby Indian Tribe were fishermen and the fishing season started in mid-April. If we had gone beyond the middle of April, we would have had no Indians at the negotiating table! So it was a very realistic deadline! Another thing that happened was the County Government was due to change the 1st of May and if we hadn't been able to reach an agreement by that time, we would have had to bring in a whole new governmental body, and educate them to the process and to the problems, so there was some very realistic deadlines there. I would say most of our exploration and process design can be done within a 5 month period, and negotiating within a 2 month period, but it varies tremenduously from dispute to dispute.

Question

Confidentiality

Does mediation always take place in a confidential atmosphere and, if not, could you prejudice your position if you decided to go before the courts?

Answer

Well, it is certainly not a secret process. It doesn't happen behind closed doors, except very rarely. In one dispute that Gerry mediated there was public bodies involved and the entire process was a public process, with T.V. cameras there for the negotiating sessions. Fortunately, they only have so much film and they had run out of film after about 20 minutes and then the people could get down to work. But because the media is there, people tend to posture instead of getting down to the nitty gritty. They posture for their constituencies, which is probably appropriate, but if that is all they do, then they never get anything negotiated. In the dispute between the Indian Tribe and the County Government, the Indians said "we are not going to be at the negotiating table if the media is there" and the County government felt pretty much the same. So we simply talked to the media, and said this is a very delicate process, we will let you know when we come up with an agreement, but please stay out of it and they did. And we worked out a pretty good relationship with the media.

As far as going through the courts is concerned, we have mediated disputes before, during, and after litigation. We don't see mediation as necessarily an alternative to litigation, although sometimes it may be. In fact, sometimes it takes legal action to bring the parties to the table. Again, it is a voluntary process, you can't force people to the negotiating table but legal action by one party or the other can sometimes create a kind of power balance that makes mediation appropriate. One party may not want to negotiate with another party because this party thinks it is going to win. But if (through some legal action) this party can gain some kind of clout or some sort of sanction on this other party, so it is in this party's best interest to negotiate, then that may be appropriate.

Gerry:

Without Prejudice Negotiations

I might just add to that, neither Verne nor I are attorneys. The other part of the question you asked is "If we show some of our cards in negotiation and we don't agree, when we get to court does that mean we somehow have prejudiced our position?" I know some of you are attornies and could address that question. In experiences we have been involved in, there is provision under which the parties negotiations cannot be brought before the courts, if the suit is actually tried, there is provision under the judical process for that kind of arrangement.

As far as our own confidentiality is concerned, so far we have been able to protect it; where litigation does occur we have not been subject to subpeona or further depositions. I think that is something you want to think about very very carefully before you get into negotiations; remember, mediation is nothing more or less than helping negotiations go ahead. You can have negotiations without a mediator; you can have mediation without negotiations. But one of the things that you should be very careful about is having some of those guarantees built in, and make sure there is a real attempt on all sides to reach agreement, so you don't end up in court later and find yourself in difficulties. Because if you don't level and lay on the table those things that go beyond what you are willing to say in court, you are not going to get an agreement. That is part of the design of the process.

It's an important part of designing the process that you spend a lot of time testing each other out. There are many times when we make process, that we stretch things out farther because we don't think the parties are ready to sit down at the table yet. Even if most of the points are figured out, they are still kind of testing each other out; testing, not solving. Far better that testing should happen on relatively mutual issues of process than on the basic issues that are really dividing them.

I think probably Gardner and Mike this afternoon will be talking about some of the dilemmas they have faced in terms of whether or not negotiations can happen in camera, and whether they can be referred to later (by the courts).

Question

Level of Involvement

Do you apply your techniques at a particular level?

Answer

Yes, largely we feel that the site-specific level is where mediation is most appropriate in environmental and land use disputes. You will have an entirely different set of players at the two levels, and one of the disputes I have been looking at at the Saun Islands had reached a certain level in the natural evolution of a conflict where we thought mediation might be appropriate. Several things have happened in the last two or three weeks which have changed the dynamics and which may bring other parties out of the woodwork so to speak, so we have suspended our exploration and withdrawn our services until some of these things have a chance to settle out. Because if we did continue with mediation at the present time, there might be new parties emerge at a later date to stop implemntation.

I would mention also this dispute I mediated in California between negotiators for the homeowners, five elected officials, and the president of the local horseman's association. The conflict had reached its climax two years earlier and because of bugetary constraints no development had occurred for two years, before the parties decided to continue with their development plans. They wanted to get concensus from the local neighbourhood. A new neighbourhood had emerged in the East Bay area, which had been wood and hillsides, two years earlier; when the conflict reached its climax, suddenly there were forty-two new homes and the new homeowners felt they had to be involved. Originally, we tried to involve them as part of an existing community

and they came as observers to our first two negotiating sessions. After that second negotiating session, one of the homeowners came to me and said "we think we have unique problems, we would like a seat at the table, we would like to have a negotiator". I said that I had no problem with them having a negotiator, as long as none of the other parties had a problem with it, because the parties design the process. So even after we had gone into negotiation, we added a party, because that party had a different agenda, in a sense.

Unresolvable Disputes

I think one of the big problems is we think we can like each other and agree, and we can't. Nobody is ever going to be happy when certain things happen. We found we have been unable to mediate in nuclear oriented disputes: siting of nuclear facilities, nuclear waste sites, and so on. Because people were against nuclear power on such a philosophical level that they would rather be defeated then compromise.

But the one Verne mentioned is this case of taking nuclear ore out of the mountain side in the Dennison National Forest Colorado. There was a coalition of groups who opposed the mining of nuclear ore; they couldn't care less about the environment; they couldn't care less about anything else, but they didn't think you should take nuclear ore out because the first thing you know it would be nuclear power and nuclear weapons. They would never negotiate; we could never have negotiated that one until they lost.

The Company got the permit and started to mine the ore. At that point the anti-nuclear coalition said "Ah, we've lost", "We won't oppose you if you sit down to negotiate." They negotiated a settlement the company had wanted although they had their permits, they were getting bled to death in the courts. It was costing them 250 thousand dollars a month; more than that, it was running into the ten's of millions a year in costs of delay. They were winning, but they really couldn't afford to win; the other side was losing, but they knew they

might totally lose, so they sat down and negotiated. The hardest part of that negotiation was the press release, in which the environmental coalition said "we think it is terrible, we don't think they should have mined, but we have reached this agreement," and the company said "we would have done this anyway, we are a good responsible company but we reached this agreement". So, if we had tried to negotiate the philosophy, we would still be there. We didn't; we hammered out a deal where they could live with each other. It is as simple as that.

Question

Who Should Be Involved

How do you start out with people who think they should be involved in the process but realistically probably shouldn't be? They are a national group, who suddenly think they should be in the middle of a little dispute between some people in their own municipality.

Answer (Verne)

In a sense, it depends on whose reality you are dealing with. And again, I guess our basic criteria here has to do with if the party could shoot the plan out of the water somewhere down the road, prevent implementation, then they have to be involved some way.

Now what has happened in a number of disputes is that someone will find out 2 or 3 weeks after the negotiations have started (they have been on vacation or something) say "what's all these negotiations going on, I am not involved and I own the property right next door!" We'll say "why don't you come to the next negotiating session and meanwhile why don't you talk to Joe Jones who has been negotiating for this neighbourhood?" "Oh, Joe Jones is involved; well, Jones knows how I feel and if Jones is satisfied, I can live with it."

In this dispute at the mouth of the Columbia River, we have national, international and environmental groups, like the Friends of the Earth; in Oregon, you have an environmental group or an environmental watchdog called Thousand Friends of Oregon. How could these parties be involved? They were concerned about the outcome, they didn't want a coal port, a coal export facility, down there.

Interested Groups Not Involved

One of the questions we asked was "how is the general public represented at the negotiating table." We did a lot of shuttle diplomacy; we tuned in these parties to what was going on --- there were certain elected officials at the negotiating table that represented some of them, in a fashion. There were resource agencies, the State Department of Fish and Wildlife, and the Federal Authorities. All were concerned about the same values that some of the environmental groups were concerned about. As a matter of fact, one of the environmental groups said "we are too busy lobbying in the State Capital right now to be involved in your negotiations but we are interested in what's going on there. Keep us informed. We trust the guy who represents the State Fish and Wildlife people, and if he says its o.k., we probably can go along with it." So none of those parties were directly involved; the mediator kept them tuned in, and let them know what was happening.

But some of these concerns were also voiced through some of the negotiators at the table. There are broad constituencies, and there may be specific constituencies represented by some of these negotiators. But each negotiator has a responsibility to inform his constituency, and has the responsibility for bringing the concerns of that constituency to the negotiating table. In some manner or another, these elements need to be represented or mediation may not work.

Gerry:

The hard answer is that it is pretty hard to ignore anybody who can keep you from working out what can be agreed to. But over and over we find that national groups that can care less about what happens in that particular situation are looking for an issue in order to pursue some broader aims. Is that the kind of thing you are thinking about?

Major Interest Group Involvement

We have been looking at some problems over hazardous waste management, and one of the things we have been discovering is that a lot of national interest groups, both from industry, various good government associations and various environmental groups don't feel that anybody will pay attention to them when they are setting policy at the national (or I guess in your context the Provincial level) and as a result they have to wait until somebody is trying to do something somewhere. Then they come in, and piggyback on that to raise the issues they're interested in. And we have been able to, in some situations, to get them out of the local disputes by helping to define some limits within which they can live, so that they really aren't at the table.

A lot of times the reason the local government gets really difficult problems dumped on their laps is because senior levels of government have not done their job and everything lands at the local level, where many of the questions that are addressed cannot be resolved. You have got to sort out what levels of decisions are made at what level. We have got into some situations where you have a coalition of local interests, local entities, who are normally fighting with each other who get together and say, " you know, our real problem is in Edmonton or in Ottawa, and let's go get them"; so they gang up and say "oh, don't give us these wishy-washy answers. What is the rule here, is that a regulation, or is that some senior bureaucrat's idea of how government should work?" Now, I know this never happens in Canada, but

I have discovered that many officials at senior levels of government don't like to be clear about what the rules are, because they then can't make any decision they want. I guess that never gets North of the border!

Verne:

Authority of Negotiator

I would like to bring up a point that Henry Kissinger made in his most recent book. In his second volume, he is talking about the negotiations that went on between the Israelies and the Egyptians. He was on a plane, heading for Russia to meet with Brezhnev, and he had a secret package which was supposed to be opened after he got on the plane. It included a letter from Richard Nixon which said, "I am giving you full authority to negotiate for the United States". Kissinger said "no, no, no, I don't want that!" There was a letter that went to Brezhnev which said the same thing; Kissinger knew Brezhnev would know when he got there that Kissinger had full authority to negotiate for the United States. Kissinger didn't want that because it gave him no back up position; it gave him no opportunity to say "I have got to check that out with the President."

Role of Bureaucrats

Something else I said earlier, that I wanted to clarify a little. I said something about bureaucrats being decision makers. In the United States so many of our decision-making processes are adversary processes, which require every special interest to develop its own best special interest case. These cases are then dumped into the bureaucratic hopper, through what we call the 'environmental impact process', and the bureaucrats are stuck with having to make the trade offs. They are stuck with guessing where the bottom lines are. All of these people, putting their best cases into the bureaucratic hopper recognize that there is going to be some kind of compromise. They make their best case so that they will be at some advantage when these compromises are made. Yet the bureaucrats get stuck with having to guess at where those bottom lines are.

In mediation, when you are negotiating among those parties, bottom lines come to the fore; you can discover where those bottom lines are. So many times I have bureaucrats say to me "well, we have come up with a plan that nobody likes, so it must be in balance," I don't think it has to be that way; in fact, I know it doesn't have to be that way because we have helped parties come up with plans that are in balance and everybody is happy enough with them to ratify them.

Question

Unequal Power of Participants

What sort of sanctions do the various groups have? It seems to me that some have a much larger hand then others and they really are not at the table with equal footing. How do you resolve that?

Verne:

What sanctions do various parties have on other parties? I talked about some need for some balance of power: all parties should have some sanction on other parties. What kinds of sanctions are there? Some sanctions are administrative; some of them are simply public relations kinds of things. This party, if it doesn't get its way, can cause such a stink that it is going to make the other side look bad or sometimes its going to cost them. They can delay and delay and this delay costs the party a lot of money. There are many different kinds of power to be exerted and one of the things we try to suggest to parties is that they not negotiate if they don't feel they have some power, because they may get co-opted. If it isn't in a weak party's best interest to negotiate with a strong party --- the strong party knows it can win somewhere along the way, and they may be negotiating just to delay. That is one of the things we have to be careful of, that our services are not used as a sanction, in a sense. We don't want anyone to look good or look bad or be at an advantage or a disadvantage, for having tried mediation and found it not working. We don't want to be used as a power-building tool by anyone.

Gerry:

I just want to say that this is a very pragmatic process we are talking about. You aren't going to get what you don't have power to get. You aren't going to get powerful in negotiations and mediation. If somebody doesn't have power or clout, they aren't going to be there; they are going to be ignored. "Rights are a matter between equals; while the strong do what they will, the weak suffer what they must." I don't really think government has changed a whole lot: most of us like to help others, as long as they are willing to be helped, in the way which we think they should be helped. Isn't that right?

Question

Role of Mediator

I am interested in the role of the mediator. It seems to me that this must be a very time-consuming role: Are you right in it at the very beginning, and do you do all the activity or work yourself?

Verne:

Building Trust

We are pretty much in it from the beginning, that is part of the business of building trust. In almost every dispute we get into there is a tremendous lack of trust among parties. The mediator, in order to be effective, must be trusted by all parties, and that trust develops. I won't forget spending a rainy evening in a little bar down on the coast of Oregon, drinking beer and throwing darts with a fellow who was explaining to us how the Oregon land use planning process worked. We learned a lot; we developed a lot of rapport.

When we were working with this Indian tribe, we met with every individual member of the Tribal Council. One of them was a truck driver who went to work at seven o'clock in the morning. In the evening his son was on the wrestling team; he wanted to watch his son in his wrestling matches, so he didn't want to talk to the negotiators or mediators. So we said "when can we meet with you?" He said, "well, usually at six o'clock in the morning." I stopped at this

little restaurant for breakfast, at six o'clock the next morning, to meet with him and it impressed the guy. You know, the fact we would take our time to meet with him. He trusted us after that.

We found in the Crest dispute, in the estuary, that we spent 11-1/2 hours doing other things, for every hour that was spent at the negotiating table. We found that we spent 1250 hours in this entire process, and only one hundred hours at the negotiating table. The kinds of things the mediator does are the kinds of things that help build trust: we carry messages that various parties want us to carry, and we don't carry messages they don't want us to carry. We check things out very carefully: people are testing us, they need sometime to test us, to see if they can trust us. The only power the mediator has is the trust that the parties have in the mediator.

Gerry:

Time Aspects

It is a time consuming process; it takes a lot of time, and it isn't easy to hand that trust off to somebody else. We often work as a team so that we can cover each other off and provide back up. One of the questions this gentleman asked about is the confidentiality of the process, and whether you leave yourself wide open to get snookered later. This relates to what Verne was just saying. You know where most of the movement happens; it is when somebody says to me "listen, Gerry I never want this to be public, but if they could may be do this for me, we might be able to look at this." We go running over to the other side and say "you know, I don't know whether you even thought of this, but I just got a feeling that may be if you could find some way to move in this area, we might be able to talk them into doing such and such." Now, that way neither of them is ever put in a position, at the table in public, that they have to back down from.

Question

Confidentiality

Do you destroy your files when you are finished, when completely done with the process?

No. We have fairly substantial files for our personal use: confidential files we don't share with anyone else. They have been subpoenaed in the court, and we have withstood those demands for our notes and minds.

Gerry:

We would have destroyed them if the courts had demanded that we turn them over. I would have gone to jail; I was ready for it. I was going to write a book!

Question

Arbitration

When you decide that mediation is not an appropriate process, would you institute binding arbitration and if so, would you be involved?

Verne

Essentially, we are mediators and not involved in arbitration. There are a lot of people who are both arbitrators and mediators. Our particular process is mediation, and we make no recommendations. We bow out of a dispute without pointing fingers in any direction. We may suggest behind the scenes that something be done, but generally we don't. We will bow out of a dispute by saying simply that we have spent a good bit of time exploring this dispute, and it seems at this time that mediation is not an appropriate mechanism for helping to resolve these issues.

Gerry:

I think arbitration has a very, very limited application in most of the kinds of disputes that I understand that you are all involved in. Typically, where arbitration has been tried (in my opinion) in these rather complex inter-governmental disputes, it doesn't mean anything because there is always somebody else who can challenge the arbitration having happened. It is very much like being in court; it is just that you have got there a little more quickly.

Does Alberta have a standard arbitration statute? Yes you do have. Under the arbitration statute, you can't appeal on the merits, is that right? You can only appeal if there were some obvious malfeasance on the part of the arbitrator? There are very few situations where the legislated definition of the parties is sufficiently clear that I think you can make that work. In most cases to recommend arbitration would be more often to recommend an exercise in futility. Because, as you know, arbitration is nothing more or less than a private judicial process with looser rules of evidence.

Does that fit with your experience?

Question

It seems to me that one of the strengths of the position in which you deal lies in the fact that you yourselves are independently funded from the parties who are in the conflict or dispute. If you were deprived of that funding or were consulting to people who were setting up a process without similar means, how do you think you would suggest that this problem could be overcome?

Gerry:

Independence of Mediators

You know the history of mediation, in Canada, is that it is paid for out of the public purse. It is paid for by the Federal or Provincial governments as a matter of public policy, because it is in the best interests of the body-politic to reconcile disputes where you can't see everything. Labour mediators, at the Federal and Provincial level, are paid for and they don't charge the parties. I think most of you are familiar with that. Now they are paid nonetheless by the Federal government and or the provincial government and they may mediate disputes that involve federal or provincial entities. Isn't that right?

Funding

But they are trusted, because they are insulated from the dispute in such a way that neither their funding, nor their personal future is directly related to the issue. So they are paid for by the Government, and they are independent. Their independence is based on a long history; people expect mediators to be independent in labour disputes, and they are paid that way. I think that may be the model that somewhere down the road, we may see emerging here.

We are now involved in a situation in California under which we are paid by a body called the California State Solid Waste Management Board, and their authority is a very interesting one. They are empowered under State law to require each county jurisdiction (which would in some cases be parallel to your rural municipalities, and in other cases it would be a combination of rural and urban municipalities) to have a plan. The plan must have

certain things in it; that is their only power. If somebody wants to build a dump or a transfer station, they review it to make sure that it is congruent with the plan. Now they have said to all the local governments, we will pay the cost, the travel expenses, the per diems of the mediators from the Institute to solve your problems, if you request us to do that." The State says "Here is a resource that you might want to use and if you request it, and a local interest group such as the garbage haulers, the recyclers, and so on want it, we will make them available, we will pay their way." We are nervous about that; we are going to see how it works. I think the jury is really out on that one.

Question:

What do you do when the negotiators seem to work with each other and against the interests of the client?

Verne:

Role of Negotiator

I think it is tragic when that happens and I have seen it happen too. One reason is when parties begin to rely too much on professionals who represent their interests. You get a gap, and suddenly they are agreeing on something that they think is best for you. We had situations where we refused to hold any more negotiation sessions because we felt that the representatives were getting too far ahead of their constitutents. There is always the danger that professional negotiators and professional mediators belong to the same clubs,

eat lunch at the same restaurants, and really begin to make deals for other people. I think that it is a tragedy when that happens and I am sorry that that was the situation you found yourself in. I think at that point, it is incumbent on the people who hired that professional negotiator to grab him by the scruff of the neck and throw him as far as they can. That is your right at any point.

Often mediators, just because they are very distinguished, and are eloquent and obviously have a grasp for the situation, people get kind of in awe of them. But often we forget that at any point when we are sitting around the table and you say to me, "I don't trust you anymore," then I am out of the game. The party should remember that it is their right at any point to tell the mediator to take a walk, or to tell their professional negotiator to take a walk. I think that there is a duel responsibility here; that is, to keep a very tight --- I was going to say rein, but I think noose is often more appropriate --- on your negotiator.

I think before you go into negotiation you should have a very clear understanding of what the negotiators responsibility is to you, how far they can go without checking back, and the understanding concerning changing a position. There is an article that I wrote which is not very popular with some of my colleagues in the mediation field, in which I dealt with some of these kind of things. To me arbitrators would like to be judges, but they are not sufficiently qualified. So they respond by trying to make arbitration as much like the judicial process as they can. The first thing you know, they are all going to be wearing robes! It is already questioned whether we are in wigs, in some cases. It is easy to want to play God, which is like being an arbitrator or a judge, I guess; I think the parties really have to watch their mediators and negotiators.

Funding

Question:

If the government has the luxury of having a mediation or arbitration take place in the field, I think we have to very carefully examine what process would be in place, and precisely what involvement there would be between the funding agency and the mediators. When we have had conciliation officers come out on labour disputes, there has been a very definite sensitivity at the local level with the politicians; the conciliation officers have a vested interest in this process. I think it really boils down to who is doing it and who is paying the bill.

Gerry:

Did you ask for those conciliators, or did you have to have them?

Question:

We asked for them with a great deal of reluctance.

Gerry:

Under the Conciliation Services, I have been imposed as a conciliator in a labour dispute and I know that this is a difficult place to be in. You really have to scramble for credibility because people don't want to be there.

I think it is useful to find ways for organizations to be jointly supported and sponsored as an idea and then you have to look very carefully how you do the funding. There is money available for this in Canada. I happen to know, for example, that the Bronfman Foundation has funded an organization to set up an independant referral system for scientists and technologists. There is a real interest, I think, on the part of a number of foundations. If you really went after it, you could get some kind of support; you have to scramble for it and it is not easy, especially in these economic times.

Don't you have a little kitty in this Province called the Heritage Trust Fund? Maybe one of the things that should happen is that a little bit of that money be funnelled into this sort of activity.

The fact is that "he who pays the piper calls the tune," and I have been in many situations where industry would be willing to pay us if we could work something out, but the other side says "Gerry, I trust you, but can you imagine me going back to the people who are supporting me and saying that the mediator is paid by the other side!"

Verne:

Gerry, I would like to mention the Federal Regional Council contract again. There are a dozen different federal agencies who are party to this Federal Regional Council. They have funded us, through a contract, to explore disputes and design a process to resolve the Crest dispute, which involved four federal agencies, each in a different department. We explored that dispute and designed a process, spending 60 days in the negotiation phase. To a large extent the cost of that mediation effort was borne by the Federal Regional Council, but once we got into the formal negotiating stage, we fell back on our Foundation funding.

Gerry:

Yes, people were really putting their cards on the table, but even there we could'nt have even done that part if we didn't have a track record and people trusted us.

Verne:

Just one more thing I wanted to mention earlier, when I was talking about bureaucrats having to guess at the bottom lines in the dispute related to the Veronnie Regional Park in California. One of the elected officials, one evening, kind of got his back up and said "look, I have been backing up and backing up and backing up, and you guys keep pushing and pushing and I am fed up with it! I am giving everything and you are giving nothing! I am sick of this whole process. I am ready to call it quits and forget about mediation." There was silence for a few seconds and then someone said, "I think we have found our bottom line." You can find those bottom lines. Thank you.

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4. MEDIATION IN MUNICIPAL BOUNDARY DISPUTES, THE ONTARIO EXPERIENCE by Gardner Church, Executive Director, Finance and Administration, Ministry of Municipal Affairs and Housing (Ontario)

I have some prepared comments here which I will in due course read through to you; they are relatively short, mercifully short. Basically, what we are going to do here for the next few minutes is to try and explain to you something of why Ontario has gone the way it has in terms of inter-municipal disputes and then why I think its going to work or has worked so far. Like Verne here, we are batting a thousand at the moment, but our cases are a total of two, so we have a way to go to prove ourselves!

I will start with a quote from the Minister of the day, the Hon. Tom Wells, speaking to the Ontario Municipal Association about how this new process was established:

"Here we were committed to cooperation and coordination; in the middle of what threatened to become the Great Ontario Border War...The scenario had all the makings of The Showdown at OK Corral but what evolved was a statesmanlike exchange of reasonable and accommodating people." T. L. Wells, Ontario Ministry of Intergovernmental Affairs, August 20, 1979.

The "statesmanlike" exchange was a meeting of urban and rural municipal leaders in Toronto in April of 1979. The concensus emerging from that conference eventually allowed the Government of Ontario to call a halt to a long standing practice of resolving municipal differences through urban/rural confrontation and adversarial proceedings. The Government then embarked on a pilot project to test a new process that had been worked out with a broad cross section of municipal leaders.

Since that day three significant and related pieces of legislature have passed through the Ontario Legislature. They were The Brantford/Brant Annexation Act of 1980, The Barrie Innisfil Annexation Act of 1981 and The Municipal Boundary Negotiations Act.

The first two represented the culmination of a decade long "border wars". They had been resolved in a matter of months using the new approach to boundary problems. Previous efforts in both cases included protracted quasi-judicial hearings, commissions of inquiries and innumerable consulting studies. In the Barrie case the issues had also been heard in every Court in the land. In just these two areas, millions of dollars (some would say many millions) had been spent, hundreds of thousands of hours had been invested, dozens of government bodies at two levels had been involved but contention still split the communities.

What magic did the new boundary mediation process have that overcame this history of bitter intransigence and division between neighbouring municipalities? What was it about the new process that so encouraged the Government of Ontario that it threw away 75 years of tradition in passing the new Municipal Boundaries Negotiations Act?

The answer is at once simple and complex. The simple part of the answer is that the Government of Ontario placed its faith in local, elected representatives to work out a solution to local problems. Lawyers, judges, arbitrators, consultants and bureaucrats were left out of the equation and the full effects of political accountability were allowed to work their wonders. The new process in Ontario is the quintessential expression of faith in local representative democracy.

The complex part of the answer involves the history of local government in Ontario, the evolution of the previous method of resolving these issues, and I fear, some social psychology.

Municipal boundaries are unique in the world of political borders. They are, in some jurisdictions, as rigid as those of sovereign states. In other times and places they change as easily as the seasons. In Canada, municipalities have no constitutional foundation. Their existence is a matter of Provincial option and their composition, boundaries, functions and methods of operation are prescribed by the Provincial Legislatures.

Nevertheless, municipalities are generally seen as a legitimate form of Government. Indeed some research has indicated that local governments are more important to and more trusted by the populace than are the senior levels of government. The boundaries of municipalities then are entirely subject to Provincial decisions, but political reality makes them an exceedingly delicate subject for Provincial decision making.

Canada's history is replete with examples of Provincial Governments going through elaborate machinations to avoid trampling on public toes over the issue of municipal boundaries. Royal Commissions, special advisory or arbitration agencies and select committees are the methods employed most frequently by Provinces to try to come to grips with boundary issues, without running roughshod over local sensibilities.

In 1906, the Ontario Government of the day handed these thorny issues to the Ontario Municipal and Railway Board. For the next half-century municipal boundaries rarely found their way into the Provincial Legislature. When disputes arose they were handled by this quasi-judicial body (which incidentally chopped Railway from its name along the line).

The excellent record of the O.M.B. in deciding municipal boundary issues is often overlooked in this debate. An examination of the record demonstrates that the wisdom of the Board has served Ontario extremely well. There will doubtlessly continue to be a role for the O.M.B. in certain of the boundary problems in the future.

However, by 1952 the world of municipal boundaries was beginning to change drastically. Babies, cars and prosperity first forced the Government to become more directly involved in municipal jurisdictions in the Toronto area. The post war explosion of population combined with unprecedented migration from rural to urban areas (facilitated by a new found mobility) rendered the City of Toronto's boundaries meaningless. In no time the forests and farms of pastoral York County were replaced by sprawling subdivisions. Faced with competing annexation and amalgamation applications, wide inequities in service levels and tax burdens and the inexorable extension of the urban complex, the Ontario Government commissioned the then chairman of the O.M.B., Lorne Cummings to find an answer.

The answer, Metroplitan Toronto, was legislated into existence in 1954. Fifteen years later a dozen other major centres in Ontario faced with the same pressures started through similar processes. They were eventually organized into Regional Municipalities to achieve the breath of area necessary to govern a modern urban area.

Throughout the early 1970's the Provincial Government continued to be actively and directly involved in municipal boundaries. They had temporarily become matters for Provincial policy and not for local settlement or judicial interpretation.

By the late 70's most of urban Ontario had been restructured and the steam had gone out of the population boom. As a result, municipal boundaries became less significant issues from a Provincial point of view.

By 1976, the O.M.B. was once again the focus for most municipal boundary activity. However the ten intervening years of local government restructuring had changed a lot of the old ways.

Municipalities were a great deal more aware of the various tools they had to press their views on boundary issues. It became the norm for a contested boundary issue to be fought on two or three fronts simultaneously. Lobbying of the Provincial Government, retention of banks of very expensive and very competent lawyers to tie the issue up in legal knots, use of consulting firms to "prove" conflicting points, development of elaborate planning strategies all became part of the annexation process.

The predictable result was a rising tide of discontent from urban and rural municipalities alike. Urban municipalities banded together to propose what amounted to annexation on demand. Rural Ontario responded with insistence on irrefutable proof of need before boundaries changed.

Perhaps surprisingly, these competing groups ultimately joined together to provide the Province with a suggested method of solving these problems.

The saw in labor management relations the kind of process that they wanted. The key focus was the local councils. They would negotiate in a controlled setting, they would, on occasion, resort to mediation and to outside advice if they required it. Only as a last resort would there be compulsory arbitration. This, the municipalities felt provided the best alternative to increased hostilities in "The Great Ontario Border War". The Ontario Government examined, modified, experimented with and ultimately accepted this view.

I still have not answered the question I posed a few minutes ago.

Why does it work? This where the social psychology comes in.

FIRST The process places responsibility for solving the problem with municipal councils. The public cannot be put off by brave assurances that "our lawyers are defending your interests" or "we have asked our consultants to deal with it" or "It's out of our hands, the Province will impose its will".

SECOND It is based on an assumption of eventual resolution. Councillors enter the process knowing that a lack of agreement at the end of the process will be received as <u>their</u> failure.

THIRD It places an onus on the Province at the outset to decide whether the issue is a matter of such significance that it will be removed from the process. If not, the Province is more or less committed to going along with the local solution (as long as it doesn't breach some set policy).

FOURTH It takes advantage of something akin to the Stockholm effect. When two groups of people are forced into a semi-social relationship for a prolonged period they will begin to see the other's point of view.

FIFTH The process includes very strong measures if one party or the other displays bad faith. If the Province becomes convinced that either party is simply delaying and refuses to deal with the concerns of the other seriously, it has powers to act and a moral commitment to do so.

SIXTH It allows resolution of a broad range of issues that may have been causing concern to one party or another. The value of establishing tradeoffs is quickly appreciated in the process. This factor more than any other contributed to the success in Barrie and Brantford.

SEVENTH The process provides a forum for concentrated problem solving of Provincial/municipal issues. Often issues will arise which require specific Provincial action before the parties can move onto agreement. Unlike any of the previous processes, this can be accommodated in the negotiation stage and even later in the process if necessary.

EIGHTH An exercise which can be characterized as "the red herring defence" can be very useful in some of the other boundary resolution exercises where detailed and prolonged examination is difficult. The use of artificial arguments and similar strategies is not very useful in a setting where councillors can explore a concern in a completely open way.

NINTH The new process is not nearly so wasteful of resources as the various adversarial methods. By the negotiating groups jointly retaining consultants where necessary the costs of research are cut by more than 50%.

TENTH The adversarial methods tend to entrench the competing parties in increasingly dogmatic stances. With a skilled chairman the new process has the opposite effect.

The new approach to resolving boundary problems is upbeat, hopeful and based on a belief in local representative democracy. It is not however foolproof. Intransigent positions, individual personalities, irresolvable differences of opinion and unacceptable taxation consequences will, from time to time, combine to cause a failure in the negotiation and mediation stages.

The new process anticipates that eventuality and vests in the Province sufficient flexibility to allow it to resolve these conflicts.

For the new method to be the great improvement that it has been touted to be, these instances must be the exception. If it becomes the rule for the Province to have to arbitrate in one way or another, the experiment will have failed. The Brantford and Barrie experiences offer us considerable encouragement that it will generally succeed.

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5. THE ONTARIO MEDIATION PROCESS by Michael Fenn, Chief Negotiator, Municipal Boundary Secretariat, Ontario Ministry of Municipal Affairs and Housing

As Gardner has indicated, the municipalities took the view, in the Ontario situation, that the process that the Province had developed didn't meet the needs of the circumstances as they presented themselves, and they came up with a process which they felt was modelled on the labour relations model although in terms of the discussions we have had today, it is probably much more appropriate to talk about it in terms of a mediation process.

Ontario Process

The basic principal must be fairly clear by now: the process is one of negotiation by municipal representatives of boundary and boundary related issues, as opposed to arbitration through the Ontario Municipal Board. Essentially, the decision was made by the Province and the municipalities that the issues that were being disputed were essentially political, related to the government of the local community. These kind of issues are essentially political, related to the government of the local community. These kind of issues are essentially political issues, involving bargaining, negotiation and attempts to reach a concensus by local elected representatives. It makes more sense to have it worked out in the local political context than through arbitration by a third party such as the Ontario Municipal Board.

Ontario History

Gardner has touched on some of the history, beginning with the completion of the local government restructuring program leading to requests by urban municipalities for an "annexation-on-demand" alternative to the quasi-judicial OMB process. The predictable response from the rural

and country upper-tier municipalities in the Province was that that was not at all appropriate. Direct negotiation was said, in preference, to have something going for it. An inter-association working group with representatives of the three major municipal associations in the Province was established to develop a process that would put things on an more rational-political negotiated basis.

Pilot Project

The first attempt to see if this sort of process would work was in the Brantford-Brant local government pilot project. Brantford is a medium size city is south-central Ontario with a long standing history of boundary disputes stemming back well into the 1950's. As one municipal representative put it, "If it can work in Brantford, it can work anywhere!"

Brantford-Brant Dispute

The government position paper was an outline of the process, outlining the experience of the Brantford-Brant pilot project and making a proposal for more general legislation. The Brantford-Brant Local Government Act, a special bill of the legislature, dealt with the boundary dispute between the Township of Brant and the City of Brantford. One of the unique features about this is that it wasn't just an annexation agreement, it was a package of agreements. It dealt with a number of issues that had some interface with questions of municipal boundaries, but it was considerably broader than the traditional annexation process. It is probably worthwhile to point out that sometimes there is the equation of the term "compromise" with these kinds of negotiation. Certainly, in the Brandford case, the end product was probably better than the sum of the parts that were proposed by the individual parties. It wasn't a saw off between the two but rather a creative and unique combination of positions both could accept.

Barrie-Innisfil Dispute

The next attempt was to try the process in Barrie. Barrie is a somewhat smaller city than Brantford, but with a somewhat bigger annexation bill. It was involved in a long and bitter annexation process that had begun in 1976 and, in the Spring of 1981 after fighting through most of the courts in the Province and the Supreme Court of Canada, came to a head. That august body brought down a decision

that the original basis for proceeding back in 1976 had not been sound and that the process would have to be started all over again. That was enough to get people to look seriously at negotiations. So the Township of Innisfail, the major suburban area on the south of Barrie, and the City of Barrie got together to discuss the possibility of a negotiated settlement.

Special Act

The main contribution of the Barrie situation was that it was the straw that broke the camel's back, resulting in a special Act of the legislature affirming the agreement. This solved half the problem; the other half of the problem was badly tied up in the Courts that we are having a little difficulty getting it untangled, and getting it put onto the same footing as the Barrie-Innisfail agreement.

Bill 147 I referred to is the general legislation that governs this process. It was developed through extensive municipal consultation and resulted in a substantially reduced role for the Province, in terms of making policy governing municipal government structure, replacing it with a role that is more one of conciliation and mediation between the local parties. The Act was proclaimed on February 1, 1982 with its main objectives to resolve annexation and amalgamation problems, and to resolve boundary related problems. There are a number of alternatives available under the legislation that may involve things other than boundary adjustments. We have had, as I mentioned, some difficulty untangling two of the cases that were involved in the Courts before this Bill was proclaimed; in addition, however, we have had seven applications for negotiation of outstanding boundary issues, and we have a fairly clear indication that we will have an additional seven before the end of June.

Boundary Disputes

In addition to the normal set of uncontested small boundary adjustments --- there are 8 or 9 at present, reflecting the normal experience of the Ontario Municipal Board --- there are 16 applications of a relatively major sort before the Board. Its normal diet of these things was 4 or 5 a year, indicating that there has been a fair amount of dissatisfaction with the old process, with people willing to let things fester rather than run the risk of getting the problem solved. It was like the old practice of bleeding the patient: the cure was almost as debilitating as the original problem!

Former Process

The previous process was quite adequately conducted by the Ontario Municipal Board, within the constraints laid on it; namely, that of a quasi-judicial process, for resolving what were essentially political issues. The obvious problems with this eventually caused the ground swell municipal pressure to obtain something which they felt was more appropriate to the problems. In the formal OMB process, people were somewhat restricted in pursuing issues to their logical conclusions. It certainly was expensive: the need to protect one's interest through hiring legal council became an increasingly expensive proposition for small municipalities. Everyone was responsible for their own costs under this process, so even the smallest township had to have lawyers as good as the large cities, in order to make its case effective.

It was an arbitration process, without the kind of political give-and-take that comes out of negotiations. The merits were decided at a hearing conducted by people from Toronto, who would sit and hear both sides, and make a determination about what was good for the local community. That had some obvious limitations, the main one being that it is a win-lose situation --- somebody wins, somebody loses -- leading to an aftermath of disharmony which, given the interdependent nature of municipal activities, can be a fairly serious problem. People who got involved in annexation disputes soon found that they could get to the point where they couldn't plan in cooperation with their neighbours; they couldn't work out servicing arrangements; they couldn't cooperate on recreation, on fire protection and a number of other things, because they couldn't be in the same room with one another.

The other thing about any quasi-judicial process is that it is somewhat intimidating for the citizens, and I might hazard -- for the council. There is a certain element of unpredictability: the Ontario Municipal Board isn't bound by precedent, so there is often a question of how the case will be considered, what kinds of things make an impression on this particular panel of the Board, and so on.

New Process

The essential feature of the new process is that the municipalities become responsible for the outcome of the issues affecting them. It is a question of local decision makers being given the opportunity to develop solutions that are satisfactory to them and, of course, being obliged to live within the solutions that they themselves have developed.

Local Politicians Negotiate

The advantages as we see them are that because the local politicians themselves are doing the negotiations on their own behalf, they have a clearer idea of what is and what isn't acceptable to them. It is not a question of how your legal council views your interest; it is not a question of people deciding from the outside what it is you really want or need.

Comprehensive Discussions

The issues aren't limited to boundaries; the process is one where irritants between municipal neighbours can be addressed on a comprehensive basis. There is a compromise involved; and a certain amount of creativity as well. An arbitration process, by contrast, really doesn't have the scope to introduce third options or combinations of the best points of all the agreements.

A municipal politician, using his or her best lights, can put together a package that might be better than the sum of the individual positions of the various negotiators. It is a tailor-made solution, reflecting the genius of the locality and the reality that what is appropriate locally, in one area, may not be appropriate elsewhere. And there is room to disagree, to negotiate on site-specific issues: how much, where, who gets involved, what kinds of policy, whether a rural life style is more appropriate than an urban style, whether a certain kind of land use is more appropriately in urban areas, whether such things are appropriate in terms of the physical viability of a municipality, and so forth.

Rural municipalities identify those things most important to them about how their community should be developing and what priorities they should be paying attention to, and so do the urban municipalities. You get a fair clarification of what the bottom lines really are. There is a fair degree of room to disagree; a great deal of heat generated, and not much light during the initial sessions. Once the issues are aired, you can move on to more specific kinds of solutions.

Issues Dealt With by Process

The typical kinds of issues dealt with in the process thus far are boundaries, annexations, amalgamation, changes in jurisdictional line of various kinds, planning concerns, land-use designations, undertakings to change policies in terms of governing land-uses, cost sharing arrangements, and the cost of delivery of municipal services, ranging from hard services (water and sewer) to the soft services like recreation, social services, libraries and things of that sort. The process has allowed examination of the financial considerations, both in terms of the effects on the municipalities as corporations, and on the individual ratepayers in the areas affected by the annexation. The transitional protection of employees is obviously something that is of considerable concern and it is something that can be addressed in these arrangements. And lastly, reflecting the political nature of this whole process, has allowed the important representational and electorial issues to be sorted out before the agreements are finally put into effect.

We don't have any specific policies in terms of what are appropriate municipal boundaries; although we try to be rational about these kinds of things, we leave it very much to the municipalities to decide what the appropriate lines are, and what kinds of factors should govern where they are located. The boundaries that are negotiated are those that make sense locally, rather than according to some abstract or objective Provincial criteria.

Fringe Development

Fringe development has often been one of the issues that either gives rise to an annexation application or is one of the issues that is more difficult to resolve. There is the question of joint planning, where municipalities need to cooperate on the provision of policies for development in an area and to govern the patterns of development. Preservation of agricultural land is very much an issue in Ontario, where many of the major growth centres also happen to be in areas of prime agricultural production. Preservation of land for mineral extraction is something we try to foster. Commercial, industrial and residential land use policies are obviously very important. You get into the kinds of situations where the core of an urban municipality is affected by something that is taking place in the nearby municipality --- a suburban shopping mall or something like that --- and the urban centre's viability is affected. Or a

Preserving Farmland

municipality wants to annex an adjacent commercial or industrial strip in another muncipality in order to strengthen its tax base, inevitably at the expense of the other side.

Cost-Sharing

Cost sharing arrangements are part of the process and may relate to water supply, sewage treatment, sanitary land fill sites, recreational facilities, libraries, police and fire protection, bus lines into suburban areas, and so forth. Inter-municipal servicing agreements and planning for the development and servicing of areas outside one municipality, in logical areas for growth in the adjoining municipality: both can be encompassed in the process of negotiation.

Creative Agreements

There is scope for a certain amount of creativity in the agreements reached; we have got into such things: area-rating certain services, giving guarantees of services, tax freezes for a certain number of years; phasing in of tax increases, in terms between the differential between the two municipalities; and so forth. The general appplication of Provincial legislation governing municipal taxation is such that although the assessment remains constant, taxation can be modified in order to reflect the particular needs of the parties in an annexation.

The corporate implications of some of these things are important as well. Municipalities inevitably and quite properly want to protect the physical viability of their municipal corporation, even after provision has been made for protecting the individual rate-payer in an area that is effected by annexation. There is the broader consideration of what the municipality should be doing to protect its financial position and, on occasion, compensation has been paid by one municipality to another to reflect the fact that the circumstances have changed. We emphasize the point that municipalities are governmental units there for the purpose of providing services to, and governmental structures for, their community; they don't own the land but are trustees of it. Not withstanding this, however, there is a legitimate concern to maintain the physical viability of the municipality.

There is the question of sorting out the assets and liabilities consequent upon an annexation or amalgamation. This is always a ticklish question because an annexation my have the result that the nature of a municipal community changes; for example, once a lot of suburban development is removed from a rural municipality it may once again become essentially a rural community, with obvious implications for the level of services and the number of employees it can afford.

Impacs on Employees

We try to make a special effort to ensure that municipalities undergoing an annexation won't do things that will adversely effect their employees, who have served them well and for whom they no doubt want to make some sort of accommodation. In addition to that, there are considerations about gearing down the operation about transferring, for example, certain numbers of police officers from one municipality to another, to reflect the change in responsibilities for that particular service.

There is the question of ensuring that as a result of this negotiation process people are adequately represented, that the area being annexed has its particular interests represented in the newer municipality.

There are really two kinds of annexation or boundary negotiation processes. One is the obvious one where a relatively small annexation is effected by mutual agreement, perhaps to accommodate a development proposal or something similar. In this case, the points of agreement are reviewed to make sure they are in compliance with the legislation and then the agreement is implemented in the normal manner.

Steps in Mediation Process

The formal negotiation process that we are here to talk about is one made necessary by a contested boundary dispute not the case where there is essential agreement. There are six steps in this case:

1. an orientation step where we familiarize people with the legislation;
2. an applicaton is made;
3. a fact-finding enquiry, where a common statement of the issues is developed before negotiations begin;
4. the formal negotiation process, leading either to an agreement or suspension of negotiations;

5. the implementation of the agreement or where no agreement has been reached; and
6. the settlement as reached by the Province.

Orientation to Mediation

The orientation is very important: we go out before any one does anything that involves a commitment and explain to them what is involved, what the commitments are, what is expected of them, what can be expected of us, and what can be expected of their neighbours.

Application

The application is made by law, by one municipality. There is no need for each party to a dispute to decide that the negotiation process is appropriate. Until now, the Municipal Board process worked on the basis that if one side wanted a dispute arbitrated, it was arbitrated and everybody was into the process whether they wanted to be or not. We have backed off from that firm rule to some extent, by permitting some degree of negotiation, and opening the possibility that the matter could be decided without an annexation or boundary issue resolution. But basically, if one municipality feels strongly about a matter and has some sort of an outline of the reasons for its application, we presume in good faith, and we expect the neighbours to sit down and to look at the issues with a view to deciding whether the matter should proceed further.

Fact Finding Step

That gets us into the fact finding stage of the process. Our fact finder is a provincial civil servant, whose job is basically to go out and summarize the position of each side based on the range of issues identified by each side, together with responses to those identified issues by the other side. In a typical case, a municipality will outline five major things that they want resolved, usually kicking off with annexation in many cases, but not necessarily. That summary of issues is presented to their counterparts and they respond to those issues and, likely as not, will identify a number of irritants that the applicant has not addressed. The applicant in turn gets a chance to respond. Fact finding yields a common statement of issues, in a summary of positions and so on. There is an attempt made to identify any concerns of the local boards particularly school boards, and the municipalities are identified that are going to need to be resolved to settle the issues identified by the fact finder.

It is a bit of a chicken-and-egg argument obviously as to who the parties are and what issues are involved, but basically there is a clarity of issues and parties emerging through the process of fact finding. The fact finder can, if there happens to be an agreement reached at this stage, finalize the agreement or work out minor adjustments to reflect the agreement, or the process can go to negotiation.

Negotiation Step

This brings us to the fourth step, which is the negotiation process. Municipal councillors, with balanced representation on each side, are appointed to the "negotiating committee", chaired by a provincial civil servant with the title of chief negotiator. Their mandate is basically to sit down, to look at the issues that have been identified in the course of the fact-finding process, and any other issues that are identified in the course of negotiations, and to hammer out an agreement. They establish a process schedule, which is basically a time table and an agreement on how the process should be accommodated, and then proceed. There is a great deal of flexibility in terms of the rules of procedure relative to things such as, conflict of interest, meeting schedules, format and so on.

In Camera Meetings

Since an opportunity was provided at the fact-finding stage for public input, the meetings are conducted in camera, with a series of press releases after each negotiating session which indicate the general category of issues being discussed. Obviously there is a need in this kind of process to avoid such obvious risks as land speculation and so forth. The process is very much one of in camera discussions where municipal councils, through their negotiators, have an opportunity to state their position and revise them in order to pursue opportunities to reach a common ground on particular issues. The decisions are achieved by concensus; although there is balanced representation from both sides in the negotiations, there is really no point in voting in this context because the ultimate agreement is not decided by the negotiating committee, but by the municipal council themselves. So it is a question of what will be acceptable to the municipal councils.

Issue Review Panel

There is provision for referral to a group called the "issue review panel" which is sort of middle ground between mediation and arbitration. This is a panel of three, constituted by the Minister on a nomination basis, similar to a board of arbitration under labour relations legislation, where each side nominates a sage individual and the Province does its best to come up with a third one. They sit down and look at the issues involved or the proposals for agreement, and try to break the deadlock. The negotiating committee can refer issues to them; the chief negotiator, as mediator, can refer matters to them in an attempt to move people off a particularly difficult issue; or the Minister himself can call them in to hear one or a range of issues, at various stages in the process. If there is an agreement, the status of the recommendation as it comes out of the negotiating committee is not binding on any party, but a package for consideration by council.

Public Meetings to Explain Proposed Agreements

The chief negotiator reports to the Minister that the negotiating committee has achieved an agreement or a package of agreements that they are prepared to recommend to their councils. In the course of events there is a public signing ceremony and then public meetings are held, an initial round for the purposes of explaining the proposed agreement, and then a subsequent round 15 days later to hear public comments and submissions. The councils then look at the proposed agreements, taking into consideration public comment, and (ideally) ratify the agreement or the agreement as amended by mutual consent; or they reject the agreement.

Ratification

Government Action

The Minister's action, if there is an agreement, is basically one of recommending to the Lt. Governor in Council (the Cabinet) that an Order in Council be struck which gives legal effect to the agreement reached by the municipalities themselves.

Minister's Options

If there is no agreement, the negotiations are suspended and the chief negotiator reports to the Minister that the negotiations have broken down irreconcilably. The Minister can take a variety of steps: he can send them back to the table, perhaps with some general guidelines as to what kind of things should be looked at; he can seek the

advice of the "issues review panel"; he can throw the parties on the mercy of the Ontario Municipal Board and ask the Board for some recommendations on the appropriate way to solve the impasse; he can go ahead, as he always can in any situation, and recommend general legislation governing municipal structure; he can terminate the application if he feels that, for example, an urban municipality has been unrealistically ambitious in its proposals and hasn't been open to adequate and appropriate counter-proposals from the other side; or he can decide they aren't proceeding in good faith, terminate the application, and tell them to come back in the next term of council, or in three years, or something of that sort. Or he can take whatever action he thinks is appropriate ..... and that is as broad as it sounds.

Time Requirements

The demands on the municipal parties is considerable: it takes the time of municipal councillors; these are sessions that involve intense negotiation; there is a lot of on-the-side negotiations involving caucus sessions and direct dealings with the mediator; and so on. It is a fairly demanding thing on municipal councils, staff too, and that impinges on the availability of human resources, including our own staff, which consists of three chief negotiators and three fact finders, with a small support staff.

Funding

Basically, the Province funds the negotiating process in terms of direct costs of negotiating, with the exception of the studies and consultant fees. When the negotiating committee decides it wants commonly stated data on a particular issue, they can hire a consultant or an auditor to give them a statement of the factual data as they see it. That cost is shared on a 50-50 basis with the Province. The direct cost for office accommodations, meetings, secretarial resources, printing and that sort of thing is paid entirely by the Province. The municipalities

are responsible for their own direct costs: if they do planning studies in anticipation of making an application, or if they do things like consult a lawyer, or something like that, that's their business and they pay the costs themselves.

Advantages of Ontario Process

As we see it, the advantages of the process are as follows:

First of all, it is much more positive and constructive than the adversary approach which is a necessary feature of any judicial proceeding. It is a compromise, and may even be a synergistic sort of agreement, as opposed to an all-or-nothing result. We like to say we end up with win-win settlements.

Second, there is a very broad mandate so that anything that seems to be appropriate can be part of the solution, which makes them more long lasting.

Third, in both agreements negotiated at this point, the rural municipalities have bought themselves some peace for a considerable period of time from re-occurence of annexation applications. That was a feature of the overall settlements.

Fourth, the public input is at least as considerable as is the case in the regular hearing process. This reflects the fact that it is the municipal councils, elected by the communities, which play the main role in determining what is appropriate for their communities based on what makes sense locally.

Question

I am bothered by the fact that the process seems to have represented two levels of government, the Province, and the rural and urban municipalities, but I don't see any representation of the landowners. They seem to be lost in the process.

Answer

Involvement of Public

The process we have in place reflects three things: one, the public has a right to be informed of what is going on in a general sense; two, they have the right to have input to the decision makers, in advance of the negotiations beginning; and three, there is a full public input, full hearings, discussions, and meetings after recommendations have been made. The philosophy is very straight forward: we are talking about corporate boundaries, which are corporate issues. The actual action of changing a municipal boundary does not, in fact, change somebody's enjoyment or use of his property. That comes about as a result of planning changes or servicing changes or other things that take place and are subject to the juridical processes afterward.

There is one element I passed over very briefly: the Order-in-Council that is put through the Cabinet doesn't take effect until the 28 day period for filing formal objections has lapsed. If formal objections are lodged, there is provision for a hearing process of such form to be determined by Cabinet. It might be the OMB, through a hearing officer, or something of that sort.

Question

Do you see the first two settlements setting a precedent that future ones will strive for?

Answer

Guidelines

We anticipate that, to some degree, it is very likely that the first few will set the pattern. The Province has established what came fairly close to unofficial guidelines and they argued with the municipalities of Barrie and Brantford that they should stick reasonably close to the model. The first guideline was that the assets and liabilities of the municipal corporations should be subjected to literally an accounting formula, with the value of the assets and liabilities determined through an accounting exercise. Exchanges should go on the principle that those people who created the assets should continue to get the benefit from them, or be compensated for the loss. People agree to remove this element from the negotiation. We call it the Cumming

Formula and it has been in place since the creation of Metro Toronto. It has been very successful, and I think that it is a matter of policy that it will be used in Ontario.

The other principle that we tried to establish was that when there is a substantial tax increase for people being annexed, that there be a substantial phasing-in of that increase, at least over five years. However, I don't think there is going to be any commonality over the amount of time. Brantford, for example, set-up an area where the taxes won't go up, because they are not getting any more services. It is a potential urbanization area in the future; when that takes place, the taxes will go up. Until such times as urban services are introduced to an area, the taxes will not go up at all but will stay at the county level.

Now Mike might have something more to say about the other kinds of precedence we may be creating.

Question

Political Influence

We were involved in a labour negotiation situation in which a fact-finder was sent in, and it was interesting that the "facts" coincided with the MLA's feelings in this case. Is there a danger here, and how have you handled it?

Answer

There certainly is!

Compiling Issues

We are at this very moment in a situation where there is an a annexation in which the MLA has very strong interest but there is no doubt that the list of issues that are going to be generated won't be ours and they won't be the MLA's. They will be the township's and the cities', and the fact-finders, and the chief negotiators will play at that point a recorder's role. When it comes to compiling the list of issues, there is no editorial exercise; it is strictly a matter of lining up the issues that people identify, whether they are ridiculous or not.

One of the issues that has sort of grown from talking to a large number of municipalities is that the fact-finding stage initially constituted something of an unknown, perhaps even a threat to some of the municipalities. As a result, we moved it away from being a process where there is a great deal of judgement and discretion, to one in which the views expressed or summarized

are essentially those of the municipalities themselves, as seen by the municipalities themselves, with perhaps additional facts relating to the servicing agreement or whatever. Since they are the ones that are negotiating, their view of the world is one that is going to have to determine how things proceed. They might not correspond with our view but, then again, we are not the parties involved.

Negotiating the Issues

In Brantford, for example the city produced 110 pages of issues; the township, not to be outdone, came back with 115. We sat down with 225 pages of issues, and we negotiated them. For the first couple of weeks we were going with every dotted i and crossed t but after that we were whipping through page-by-page saying "this is garbage" and " that is garbage, lets get to the next one that is really substantial"!

Question

Rural-Urban Influences

What kind of saw-off did you have between the rural municipalities and the urban municipalities over urban development and land use?

Answer

In the two that we have done so far, there were quite different solutions. In the Brantford area, we identified an area for strictly agricultural uses, surrounding the city, where the township was going to be forbidden, without the consent of the city council, to allow urban development of any sort. There had been a history of urban development sprawling outside the city and of shopping centres going up resulting in the downtown having trouble. The township agreed that they would ensure that the properties that were now in agriculture would stay that way for 23 years (and it's the best tobbaco land in Canada).

The land owners would have the opportunity to be heard by members of the Ontario Municipal Board after the Act had passed, if they were able to demonstrate that this did an injustice. There was, in other words, a mechanism to correct that and it is still going on.

In Barrie, it was quite a different exercise. Much of the land in Brantford was incidently already zoned for urban development. In fact, if the zoning that was in place resulted in development 70,000 people would have moved into the fringe, doubling the present population.

In Barrie the land was already zoned for agriculture and had been frozen for some years. There was a very militant policy in the township to keep it that way. All the legislation did in that case was maintain it and say "if you want to change it, you need the approval of both councils instead of one". Now I believe that that didn't change much but there are farmers who say it changes everything, and suspect that it is going to go to court.

But I think that there is a very good question that should be raised and tested in court: does the fact that you have to get two councils to approve a change instead of one, in order to allow for urban development, prejudice the rights of any property owner? In the minds of several of my colleagues in the legal profession, it does and I think that it is something we will have to have a look at.

Question

What about soft service areas?

Answer

Social Service Aspects

There were no significant problems in Barrie, in that they already had a joint unit that was working reasonably well. In Brantford there was a terrific problem, which has now become worse because of the shut-down of the two major employers. The township was terrifically prosperous with only 10 or 12 thousand people, but with an assessment about 40% of the city's,with 70,000 people. Yet the township was only paying a pittance towards the social services expenditures of the area.

The negotiations produced an agreement where the township agreed to increase its contribution to the social services of the area as a whole, on a formula in which their contribution increased directly in relation to the city's capacity not to pay. The poorer the city got, the more the township contributed which means now that the township is contributing a whale of a lot because the city went broke. The reason for that was fairly straight forward: the township argued that in good times it shouldn't be sharing a portion of the city's burden, but that in bad times everbody should be pulling together. It was that sort of "depression mentality" that went into the agreement, unfortunately for the township.

Detailed Bargaining Points

It depends on what you mean by soft services, but let me give you an example in terms of recreation --- to give you an idea of how detailed the agreements become in order to reach political compromise. In the Barrie agreement, the township people were promised a certain number of nights during the summer to use the tennis courts, like Tuesday and Thursday guaranteed, and a certain number of other nights. It got down into those kind of details in order to make sure the whole package of agreements would be mutually acceptable.

Question

In other words, you are ready to negotiate down to the last hour if it will produce something?

Answer

The negotiation package for Brantford is immense, hundreds and hundreds of pages of detail. It wasn't nearly that big in Barrie, I think 15 pages or something: pretty close. But yes, there is a lot of detail, and it takes time to get agreement.

Question

Compensation in Annexation

I must say the process that you have outlined makes what we have just gone through in Edmonton look absolutely archaic. It sounds like the philosophy is that the annexing area is responsible for compensation, to a large degree, to the reduced municipalities. Is that a valid observation?

Answer

Not entirely; I guess I have to say "yes" and "no"! To the degree that the municipality that is losing people or land can lay claim to having their whole order of operation terribly interrupted; to the degree that they can convince the annexing municipality that it is a real concern and that that is their bottom line, then they are going to have to compensate. In Brantford, however, the city had a pretty shrewd view that because the township was so rich, it could take a pretty through kicking, in terms of percentage of its assessment base, and still do very nicely. So they got pretty tight-fisted with the township. The township knew its position very well, didn't need that kind of compensation, and were much more interested in other kinds of assurances rather than money. So either could happen, depending on what the bottom line of each party is. In Brantford, boundary security was far

more important to the township than the immediate financial payment. The whole issue of money was handled in, I think, about an hour and a half. In Barrie, the township was absolutely staring at the barrel of a gun. We negotiated for I guess about two months on the compensation issue.

Question

Transitional Grants

What is the Ontario Government's policy regarding transitional grants for the municipalities? Are there any over and above the negotiated amounts between the two municipalities?

Answer

No, not generally, except where the annexation is the result of a Provincial policy. In Barrie, where the annexation resulted from a Provincial growth strategy, there were Provincial funds available. But where restructuring was taking place as a result of Provincial policy, the grants are very substantial, including substantial transitional grants.

I don't want to go out on a limb in Alberta, but if you look at the Edmonton issue and compare it to that kind of issue in Ontario, Ontario did get involved and said "yes indeed this is obviously a matter of some significance to the Province as a whole" and they did pay transitional grants to ease the situation. But in Brantford where there weren't any great issues, they wouldn't normally do that. They did, in this case, because it was a pilot project and we didn't want to stick them on anything, but they wouldn't normally.

Question

Regional Involvement

What is the regional government's policy in that regard?

Answer

The regions as a whole haven't been involved in annexation, so that hasn't come up. The regions have broad boundaries, but the Province's relationship with the regions is such that when they set up the regions, we paid very very expensive transitional grants, because that was a matter of Provincial policy. What we are saying, is that essentially the Province will pay transitional grants on annexation if the Province thinks that it is a matter of Provincial interest. It's got to be on the biggies only!

Question

Differing Power

With regard to the make-up of the two sides, when one municipality differs a great deal in size from the other, don't you find that it over balances the committee, even though there are the same number of people? When one is more powerful, they can't really relate as equals, can they?

Answer

Our experience has been exactly the opposite, in the cases we were involved in, and I understand that Gerry and Verne get much the same kind of thing. The people you expect to be the least sophisticated and least likely to handle themselves in a negotiation, literally run circles around the urban people. I don't think the City of Barrie negotiators or the City of Brantford negotiators would worry about me saying this, but in each instance they were having a much rougher time dealing with the negotiating ploys and strategies of their counterparts, largely because the rurals felt besieged, and were cohesive and worked together. They had strategies: "I am going to be the good guy this week, you are going to be the bad guy", "you attack them and I will come around and pat them on the shoulder!"' They worked these very complex strategies; confused the devil out of me, I tell you, I didn't know where I was coming or going most of the time! From our point of view, the negotiating capacity of the rural municipalities is understated, at the peril of everybody, because they were really sharp.

Tactics

Question

Do you feel that strategies can overcome the power in numbers that the other side represents?

Answer

The number you represent doesn't have a lot to do with it; it is the quality of the logic. When you sit down and look at somebody nose-to-nose, night after night, and he generally has better arguments and has his homo work done better, you start feeling less and less secure in your point of view, and start being more inclined to compromise. That has been our experience.

The balance in the numbers seems to have a fair impact on it to the extent that you wouldn't want an uneven representation on either side.

Question

Speaking of the exercises we have just gone through nationally, I wonder what procedure you can put in place for amending these agreements?

Answer

Amendments to Agreements

There are two ways in which the two agreements we have now can be amended. Because they both have an extremely long life, 30 years and 23 years respectively, we were quite conscious of that. One is, of course, a unilateral amendment by the Provincial legislature. If something becomes absolutely intolerable a government always retains its right to pass legislation; this obviously would only be an escape clause, and would not normally be used.

The other is that any provision in either agreement that doesn't violate another piece of legislation, can be amended by a simple agreement between future councils. That means they can't change the boundaries by a simple agreement, but they could start a process to change the boundaries by a simple agreement. They can change ward representation; they could change transitional payments; they could change land-use patterns by simple agreement.

Question

Public Involvement

If you reach an agreement and then have public meetings, do you think we will be criticised by the public that we have reached an agreement before going to them? They may say "What is the point in coming to us if you have reached an agreement"? Yet we don't want to reveal boundaries to speculators or the press before the administrative work is completed. How do you handle this?

Answer

Yes, we ran into that in both instances. In Brantford, there were a great many people who felt outrage that they had been sold down the river, that there was no possibility for flexibility. The proof of the pudding, though, was the impact at the public meetings on the negotiators: we went back to the table and had a whole new series of negotiations. In fact, the night that there was to be a formal wrap-up, at a nice dining club, we ended up having a whale of a harange until half past two in the morning, fighting out the final details because of the public meetings.

Hardship Adjustments

There was individuals, for example, that had already sunk $100,000 into a piece of land because they wanted to develop an apartment, who now couldn't possibly sell it under the new arrangement. They were going to be personally bankrupt. That kind of claim on the conscience of the council was very significant, and we made the adjustments.

There was one that I remember very clearly. The only person who had had the confidence to invest in Brantford during bad times was being ruined by one of the properties that he had most of his interests in being tied up. The City actually swapped, took over that piece of land themselves, and gave the developer a very nice piece of land of approximate equal value that could still be developed. It was very human and a very responsive kind of approach.

But sure, sometimes their first response is outrage that they have been hoodwinked. As long as you act in good faith and are prepared to listen to people, you will prove that you haven't hoodwinked anybody.

Question

School Boards

In your Act; item 42, it mandates that the Minister shall obtain opinions from local school boards. In the recent massive annexation in Edmonton, the local boards that would receive the children denied any desire to have a further mandate. How, in your opinion, is education considered under this Act and how are the local school boards who are losing, say in excess of 15%, treated?

Answer

Well, basically the reason the provision was put in the legislation was in response to representation by the school boards themselves. The idea is basically, that municipal councils have the broad mandate to govern the community and that the local boards, including school boards, have particular mandates and specific concerns. We envisaged that provision being accommodated by the fact-finder getting the opinions of the local boards, if in fact, they had opinions to give. Later on, if the agreement appeared like it was going to have the effect that you are talking about, what would happen is that the negotiating committee would attempt to reach an understanding in respect to that particular issue. Now they wouldn't introduce the school board as a party to the negotiating committee, but the negotiating committee itself might discuss those particular issues with that body, to the extent of its issue. I know in Brantford, for example, one municipality that wasn't directly involved was brought in to discuss a particular issue, that was sorted out to their satisfaction, and then they proceeded with the agreement.

I think the 15% you refer to is the traditional figure in Ontario for transitional assistance. In the event that any school board loses more than 15% of its equally weighted assessment to an annexation or to an economic downturn, traditionally the province has chipped in with transitional assistance. That tradition is well known and is honoured in the negotiations; if it weren't, the Minister of Education would object, and it would be stopped under privilege of Provincial policy.

The big difference between here and Ontario is that the education system in Ontario is county-wide and the cities are included within a single Board of Education, so a boundary change will very rarely affect the local Board. In the only case I am painfully familiar with, when we created the Region of Durham, and damaged the school catchment of the Norththumberland Board of Education, the cost was so great, that we actually changed the boundaries first of the region and municipalities, and secondly of the school board, so that they were no longer coterminus and the dislocation was prevented. I think the educational forces are sufficiently well entrenched in both provinces that it would be very difficult, as a matter of policy, for one of these negotiated settlements to really put the screws to any one board. It would result in the province stepping in and saying no, this violates Provincial policy, you must accommodate the concern.

The Order-in-Council goes through Cabinet and each Cabinet Minister, in respect to his area of jurisdiction, will have his say. If we are doing our job properly we try to make sure that individual ministries, whether environment, education or any of the others, have had an opportunity to express their views, and are relatively satisfied with the kinds of results that have been worked out.

Question

Farmland

Annexations must encompass large areas of farmland as urbanization starts to creep into the rural areas. I have seen documents to the effect that in the States the farms are guaranteed the right to farm; has this been negotiated in your examples?

Answer

Yes, it has. In Brantford there was a considerable concern when they annexed a large piece of territory for future urbanization. It was generally agree that it had to be protected for future urbanization but there were several property owners who were running very good market farms,who had no desire to sell. The city didn't want it at the moment and the net result of the annexation would have made it uneconomical to farm because of the increased property tax. The result was that there was an area rate negotiated in which the effective tax rate increased by only about 4% for those farmers, rather than the 40 or 50 percent it would have been if it had gone to the normal city tax rate. That again was done to a certain degree in Barrie although there it was a different arrangement. There they decided not to annex land they would have otherwise annexed; in return for which the township agreed that it would have to remain farmland. So I think I would be willing to say that the productive farmland was a major issue in both these situations. It certainly was a major issue when it caused the City of Brantford to change its plans to develop its industrial park in a magnificant flat area,that could have been annexed, and instead went to a wasted moonscape when the township argued that they were not going to ruin good agriculture land.

Question

Development Freeze

You suggest to us that a county or a rural municipality can freeze development --- the suggestion was that the land would not come into the urban municipalities as long as it remained farmland. Somehow you have got to contravene the existing planning legislature if you want to do that.

Answer

Yes, that is right, and there are two ways you can do it. One is that you can agree for 30 years that the councils will fight any urbanization, which is just really an agreement to agree. It has no effect, except when you get down to the short strokes, you presumably are going to show up at whatever planning body is having a hearing to say "we object to this on principle".

Property Owner's Interests

Another thing you can do, which we did in both cases, was say that this is important enough to the Province and important enough to the locals, that we are going to pass legislation which will override all existing legislation. We did that fully conscious that there was a significant effect on the rights of the property owner. The result was that we fell over backwards to try to accommodate the property owners interests, and bring them to more or less a satisfied point of view. The result was that only 3 property owners in Brantford showed up at the legislative hearings to object; their objections were fairly mild, things like, "I was severing one lot a year towards my retirement and now I can only have 1 lot every two years". In the case of Barrie, there was one land owner, a very large developer, who was very much affronted by this legislation and objected strenuously. The Province asserted that in the public interest this was one instance in which the speculative gain was not going to be had; the legislation was not going to be changed.

Question

Intensive Agri-cultural Uses

Did you encounter any issues related to the intensive agricultural uses --- feedlots etc --- in either of the previous two disputes.

Answer

In Barrie there was some concern because there was an existing feedlot which was very close to residential developments. It was generally agreed that we weren't going to compound the error on the other two sides of the feedlot, by permitting development.

In sessions we have had with municipalities around the province when the legislation is being explained, you will get questions from individual farmers about their certificates of compliance, which is sort of a permitted agricultural use. It could include feedlots, pork farming and that sort of thing. That kind of concern is usually responded to with a point that all manner of bylaws, in terms of nuisance, zoning and that sort of thing, are subject to being included in the framework of the negotiations. Make a representation to your elected representatives; they will be aware of those concerns, and will take them into consideration, with the option at the other end, of course, that is if you are still aggrieved; there is a formal opportunity to object to what is proposed.

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6. PARTICIPANTS' VIEWS ON THE APPLICABILITY OF MEDIATION TO SOLVING PLANNING DISPUTES IN ALBERTA

The participants were divided into a number of small groups and asked to discuss the question "Can the concept of mediation of planning and municipal disputes be successfully applied to Alberta? The groups then reported back in plenary.

Group One Report

Our group said "yes", the concept could be successfully applied in Alberta. Some form of Provincial funds should be made available, with no strings attached. That is a prerequisite to it working. The mediator should be paid, with a user pay fee proportional to ability to pay. The municipalities should have a stake in the financing so they will encourage the process.

Group Two Report

We saw the concept's success as tied very closely to how the process would be funded.

We came up with the idea that we would like to try a pilot project on a small scale to begin with, in order to prove that it would work. We were very skeptical about the Provincial funding; we felt it would inevitably influence the way the process operated. So we thought we could start with a pilot project; by showing some success with that, we could then try to obtain some foundation grants. We weren't at all sure, just how or where but we thought it could be done. We said the funding should be available from independent sources, if possible.

We felt that some contribution from the parties involved was essential, in particular in regard to some of the public participation groups. No matter how little, they should have to contribute something toward the cost of the process. Funds could be made available from government and private companies. The fund for a pilot project would probably have to come from Provincial sources, but after the pilot project proves itself it should be possible to raise contributions from elsewhere.

We felt the body should be independent and not subject to governmental direction. We think that there is a benefit to be derived from the process, not just to those in the dispute, but to the whole Province. It will be necessary to build up credibility and show the savings in time and the lessening of contention.

Question

I am just not clear how the public could benefit from a process of mediation, since in the planning field there are so many disputes in which mediation would only be beneficial to private groups or individuals and not necessarily the general public. Could you explain your rationale please?

Answer

It was principally because of the saving of time. The disputes presently encountered tend to spill over into a general feeling of dissension because of the length of time it may take.

I think it was also considered that if the Province took the attitude that the contribution of funds resulted in an ultimate public benefit, rather than a benefit to just the parties involved, there would be less likelihood that the Province would influence a particular outcome. The public benefit would be the economic spinoff of the shortened time period of disputes, which now may influence the pace of development, expansion, and so forth. The economy of a town or particular area may suffer during the waiting period.

Question

I guess I have a problem with this idea of pilot projects. I don't think you need to re-invent the wheel if someone else has done something that is successful.

I think all of us in our own jurisdiction have been in the mediation process for years. We negotiated and mediated with our neigbhours and in almost all cases we proved successful without a third party. We negotiated a golf course; we negotiated with all kinds of people. This seems to be just a follow-up step when you have a difficult situation.

Question

I have some concern with the term "private funding". Could you explain what was meant by that?

Answer

We started out by thinking something along the same lines as the School Foundation Grants or the Alberta Planning Fund. It would be a fund that would pay the mediator but it wouldn't be raised from each individual dispute. We were thinking initially of some sort of requisition but then we concluded that there would be some strings attached. It would be preferred if we could get contributions from corporate or private sources, but as a pool rather than for each individual dispute.

We saw the pilot project in a very pragmatic way to maybe help somewhat with raising funds: "Here's the project, here's how it works, now give us more money to continue."

Group Three Report

Well, I think there were two things in our group's discussion: one was to recognize the value of mediation as such, but we saw a particular body being necessary, to develop some credibility through a trial project.

The other thing that was on our mind was that we haven't developed the foundations as well as they have in the United States. We don't have that many, so we would need some seed money, arms length money, from government. Then later perhaps we could tap large consulting firms, utility companies and people who would have a vested interest in the development of communities, to help develop a foundation to support mediation.

Question

I am opposed to the Provincial Government becoming involved in it or funding it. We presently have an ombudsman, who does this kind of thing, who has proven in the past that he doesn't really care about government policies because he has spoken against government action. I am wondering if maybe this shouldn't be an arm of that particular office, or perhaps the funding could come through there?

Secondly, I am wondering if the AAMD & C and the AUMA could not be the gatherers of funds, establish a fund for this purpose and the monies could be paid out from there.

Answer

As I understand the Alberta legislation that sets up the office of the ombudsman, his functions are quite limited as compared to the B.C. Act. I think the idea is very good, although the way it is set up right now, he investigates, makes recommendations, but he does not mediate.

Comment

I have some difficulty with the recent suggestion that the antagonist themselves pay the bill, because if you're dealing with one wealthy municipality and one not-so-wealthy municipality, it doesn't matter whether you access the funds on the basis of equalized assessment or on a capita basis, I still believe that "he who pays the piper, calls the tune" If you have one wealthy antagonist and one not-so-wealthy, I think it would not make for a good mediation process.

Comment

I find it interesting how the whole discussion has started to focus around the difficulties of finance. I think the group first of all has to decide whether or not a mediation process is needed or useful in Alberta, to answer some of the present problems.

Group Four Report

The answer to the question of whether mediating planning disputes could be successful in Alberta is "Yes". We felt those concepts could be successfully applied down to the most detailed problem level. As far as examples were concerned, we were looking at annexation as being the primary need for mediation. The current process is basically to surprise everybody by throwing in a petition and then saying "let's negotiate." This creates a very negative feeling and an adversary approach.

Even if you achieve agreement before the L.A.B. process starts, they may not agree to the agreement, for whatever reason. We went through that in Lloydminster in 1980, where we had the property owners and county's consent to the annexation and the L.A.B. still put everybody through two days of hearings. So we felt the best way to go about it is to use the Ontario example, established through legislation, requiring an agreement to be reached or not reached before the petition of the L.A.B. is made. That would definitely put the onus on all parties. There would be some attempt to resolve it in advance, and then if an agreement is reached the L.A.B. would live with it and recommend it to Cabinet. If it were not reached, then the normal hearings would take place and the normal process would be followed.

We examined the logistical problems of volunteer mediators (say through the Society) and concluded that government mediators might be the easiest approach. It would be a full time job and would require mediators at arms length in funding and free to make unqualified decisions. We felt the concept would work best in the annexation and preannexation process.

Group Five Report

We answered the question with a qualified "yes", since we didn't take a vote on it. There were people who had doubts that it would work. We looked at three areas where we could see it being helpful to have something like mediation. The first one would be boundaries, the second would be municipal neighbourhood disputes, and the third would be disputes between developers and planning departments and/or city councillors.

We felt that the L.A.B. Act should be changed to require evidence that there had been an attempt by all of the parties to resolve the issue before hand, as a pre-condition to going into an L.A.B. hearing. That would offer some positive incentive to negotiate but it wouldn't force you to if you felt that things had gone too far for mediation.

The second item we felt was necessary was to build in some disincentives into both the planning and the L.A.B. Legislation. As long as you make it easy for people to go to the Alberta Planning Board or to the L.A.B., then there really is no reason or incentive for them to use any other approach. We felt that if there was a required demonstration that you had tried mediation and having tried it, had failed, then it was appropriate for you to go to the statutory appeal group.

Group Six Report

The answer from our group was "Yes", but with some qualifications.

There is probably less need for an institutionalized arrangement such as Bill 147 in Ontario. In Alberta there was a strong preference for a voluntary approach along the lines of the Institute of Environmental Mediation. There was some concern expressed about too close a linkage with the Provincial Government and a preference that the mediators not be career public servants.

At the same time, it was recognized that the provision of highly trained, skilled mediators on a full-time basis might be more difficult to support outside the government. It was obvious of course that if it was expensive to do outside of the government it was also expensive to do inside the government.

I would just like to add that I don't think that these views really reflected a deep distrust of the Provincial Government but rather a general concern for the growing influence that government has on our lives. The possibility of a conflict of interest because of it being attached to the government was noted, although perhaps that could be avoided. The possibility of shared costs was mentioned and that might be arranged satisfactorily. In respect to private funding, it was noted by at least one person that unless it was funding by a Foundation that the possibility of a conflict of interest exists when private sources are involved.

It was also observed that government policy in the form of guidelines covering some of the contentious areas, particularly on the financial side, would be useful. There are opportunities existing for conciliation now, and a number of examples were cited. Particularly the recent case of annexation at Lethbridge, which has been resolved locally through an negotiated agreement, without the benefit of a mediator.

Nonetheless, as we observed earlier, the availability of a competent mediation facility, on request, would be most useful. Most of the formal organizations in existence function in the arbitration role. We saw potential uses for mediation in dealing with annexation/boundary problems; servicing agreements, especially for services provided by neighbouring communities to other areas (water, fire, hazardous materials, disposal and so on); the sharing of costs for oversizing; tax sharing agreements; and so forth.

It wasn't felt that there would be much need for mediation in the normal subdivision planning and approval process, but a possible exception to that could be the more contentious concerns related to sanitary land fills, sewage lagoons, hazardous waste disposal, etc. But generally facilities and administrative procedures already exist for public participation in these areas, and appeals as well.

In respect to individual complaints, it was felt that this would not require mediation service. Again there are existing channels and procedures for public inputs and appeals.

Group Seven Report

Our group had the same answer, "yes", the process could work in Alberta. The next question we looked at was what education or training should be made available to mediators. It was felt that it would be best to have people gain experience in the field of mediation. And the question was "How do you do that?" It was thought we should set up a learning situation, with experienced mediators, along with classes in psychology, so you would be able to deal with people who are in a conflict situation. A mediator should be fully aware of government process and planning, as well.

A person must also be trained in the methods of organizing a mediation process, and must also have a model of the mediation process to follow. It may have to be modified for various situations, but it was felt that there should be a recognized model to follow.

The second question we discussed was "if lists of mediators are to be maintained, on what basis should a mediator be appointed to a list?"

That was a difficult one to answer. The mediators must be able to find the time to complete the process. From what we have heard of the Seattle and Ontario experiences, full time mediators are required once mediation is underway. That was felt to be of a major concern. We didn't have any solutions to it, but we felt that whoever was picked should be capable of devoting full time to the mediation process.

The body that appoints the mediators must be totally independent, and completely above doubt. It was suggested that the AUMA and the AAMD & C could nominate people they felt they could trust in a mediation role, to the Society.

Group Eight Report

We reached agreement that mediation could be successful in Alberta. We looked at the advantages of mediation over arbitration, and concluded that the latter confuses the political situation both on a local and provincial level. When decisions are made by the participating parties, it might be easier to live with the decisions that are reached. We looked at organizations that already exist that could perform the mediation role and concluded that the regional planning commissions were in a situation where they could mediate disputes, particularly in their area. However, because of their direct involvement in the municipalities that they represent, we felt that they had fallen into a role as an arbitrator rather than a mediator.

On the question of training and education, we felt that the mediator should have some background in the basic legislation; and should bring certain abilities to communicate, to help parties understand the situation, and to interpret the issues that are put forward. We felt that there should be some education in the form of course work, along with some practical experience --- some simulation as part as the course work --- perhaps with some participation as an observer in a mediation processes. There should be some examination on both the practical and education aspects, followed by some actual mediation work.

As far as mediators getting on a particular list, and how that is done, we felt that once a training program had been developed that person could then become a member of the list. There may also be some recognition of expertise in a particular field that might qualify a person to become a mediator on the list.

7. DEVELOPMENT OF AN ALBERTA PROCESS FOR THE MEDIATION AND ARBITRATION OF PLANNING AND MUNICIPAL DISPUTES by

Roger Sturtevant, Co-founder
Alberta Arbitration and Mediation Society

Introduction

Before embarking on a proposal for the process for the mediation and arbitration of planning and municipal disputes, it is important to identify areas within the Alberta planning process in which disputes currently or potentially can arise.

General Conflicts Between Municipalities

Municipalities often have situations arise where discussion becomes heated and various interests and points-of-view are apparent. The actions of one municipality may be perceived as having adverse impact on the welfare of residents within the boundaries of another municipality. Under the Planning Act, Section 44, an inter-municipal dispute can be handled in the following manner:

> 44(1) If a council of a municipality is of the opinion that an action taken under this Act by the council of an adjacent municipality has or may have a detrimental effect within the boundaries of the first municipality, it may refer the matter to the Board whether or not the action is one that comes within the purview of a regional plan or ministerial regional plan.

The key word in this section is the word "may". If the municipalities in question find it preferable to attempt mediation to resolve their differences, or in other words take it upon themselves to come to their own decision, the process to be described within this paper could provide a satisfactory option for their consideration.

Preparation of Joint General Plans

With the advent of provisions to the Act which allow for the preparation of joint general plans, it is apparent that this process will have to take into account various points-of-view on issues of mutual concern to the municipalities involved. As described in Section 61 (3):

> The councils of 2 or more municipalities may, by each passing a by-law in accordance with Part 6, adopt a joint general municipal plan to include those areas of land lying within the boundaries of the municipalities that the councils consider necessary and on its adoption the joint general municipal plan shall be considered to be a general municipal plan for all purposes.

The process of joint general planning is in its infant stages of evolution. Similar to a general plan in most respects, the critical difference between general plans and joint general plans is the necessity to find agreement between the councils of the two or more municipalities involved. This attempt involves the preparation, ratification, and implementation of a plan that deals with areas of critical interest. Given the difficulties often found in an individual municipality's endeavor to prepare and pass the comparatively simple general municipal plan, it is clear that assistance with the process of interjurisdictional planning deserves serious consideration.

Regional Plans

Since the mid 1960's when regional planning commissions in Alberta received their mandate to prepare and effectuate regional plans, great difficulty has arisen in finding a process that has in fact produced a complete plan which could be implemented. Parts of plans and preliminary plans are tangible products of this process, but with the fast approaching deadline under Section 46 for each regional planning commission to adopt a plan by December 31, 1982, numerous interjurisdictional issues will have to be speedily resolved to put these plans in place.

The examples above are, only a few of the areas in this Province's planning and municipal matters where mediation and possible arbitration could clearly provide for a process of dispute resolution. The step-by-step analysis and agreement over the issues involved in a planning process is central to the success or failure of the process itself.

The acknowledgement of this fact leades one to the identification of numerous other areas where mediation or arbitration may be appropriate. A few of the more obvious examples in this Province would include: 1) municipal development agreements 2) annexations 3) disputes over local municipal conformance to regional plans, 4) disagreement involving community public interest vs. developer proposals and 5) municipal boundary disputes.

Possibly one of the greatest benefits of a mediation option within the Alberta planning process besides the ability of mediation to grease the wheels of consensus, is the opportunity for planning decisions at local or regional levels to be made by local and regional authorities. The spirit and intent of the Planning Act certainly lends itself to this objective for decentralized decision-making.

A quote from a member of the Ontario Brantford-Brant Project punctuates this point nicaly: "If a solution can be arrived at by people held accountable for that solution, that is preferable to one determined by a disinterested individual or panel...It is the elected politician who is responsible for governing his community. In a negotiated settlement, that person can be held accountable for his decisons."

A General Process for Alberta Mediation

In this portion of the presentation, the focus will be on a general dispute settlement process that is being made available for numerous applications in Alberta. The process involves the Alberta Arbitration and Mediation Society as 1) an initial contact 2) a supplier of information about mediation, and 3) an organization that maintains lists of mediators available to parties in dispute.

Dispute Identification

Upon one or more parties' recognition of a dispute and possible impasse, joint or individual inquiries can be made to the Alberta Arbitration and Mediation Society. The Society is available to discuss the process of mediation and the nature, issues and history of the dispute at hand. These initial orientation discussions with a party or parties then lead to recommendations by the Society with respect to the potentials for use of mediation in the settlement of the dispute. Several criteria would be developed during the orientation discussions in order to draw conclusions about the viability for successful mediation. An example of a checklist is drawn from one used by the Institute for Environmental Mediation.

Typical Criteria for Mediation

- Could all parties who have a stake in the outcome of the negotiations be represented in the process of mediation. Is any party excluded who could prevent an agreement from being carried out?

- Can the parties be brought together to discuss and generally agree on the scope of the issues to be addressed?

- Would negotiators be available from each party and would they be able to speak for their constituency? Is there reason to believe that if the negotiators reach an agreement, that agreement will be honoured by the groups they represent?

- Would the immediate disputing parties and the eventual decision-makers be able to commit themselves to a good-faith effort to reach consensual agreement?

- Can a realistic deadline be set for the negotiations?

- Are there reasonable assurances that affected governmental agencies will cooperate in carrying out an agreement if one is reached?

Declaration of Mediation

Given the party or parties mutual decisions with the Society, it is then appropriate for representatives from all parties to meet with the Society to further discuss details of a process of mediation, to select a mediator and to enter into a Declaration of Mediation.

All of the points raised in the initial orientation would be brought to the attention of each representative. At this point several items would be agreed upon for incorporation into the Declaration of Mediation.

General Items within a Declaration of Mediation

- A complete list of parties to participate in the mediation process.

- The specific issues to be addressed in order to settle the dispute.

- The names of representatives to be available throughout the mediation process.

- A deadline for settlement or referral to an arbitrator or other person, body or process.

- The mediator as chosen from Society lists.

- The sharing of costs.

- Whether or not the mediation is to be kept confidential and any specific groundrules in this regard.

It should be recognized here that the mediator would be chosen prior to the finalizing of the Declaration of Mediation in order to help establish the logistics of timing, location of mediation and fee structure.

It is important here to mention that the parties involved in the choice of a mediator must assess whether they are entirely confident that the mediator will operate effectively from a base that is clearly independent of a perceived interest with any of the parties in dispute. Further, the parties in considering the choice of a mediator, should trust the mediator to carry messages when appropriate and to honor confidential remarks. If the selection of the mediation is not readily apparent at the outset or agreed upon by all parties, the choice could be made by each party preparing a preferred choice list, recognizing that the common highest choice for a mediator would constitute a decision.

Upon agreeing on all points mentioned here, and any further relevant matters, a Declaration of Mediation would be signed and copies distributed to all disputing parties.

Mediation Definition, Guidelines and Concepts

Within the mediation process chosen and agreed to by all parties, certain common elements will be present to generally distinguish it from other forms of dispute settlement.

The definition of mediation used by the Institute of Environmental Mediation appears to be a good one for the settlement of all types of disputes.

> Mediation is a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution.

It is most important that the mediator reinforce this working definition often for parties who are not used to consensual processes to reach decisions of their own.

The following statements about the environment for mediation will further clarify the process as one which is cooperative, non-threatening and promotes creative problem solving.

- The mediator is not primarily concerned with changing the attitudes of the parties.

- Mediation will be most appropriate in dispute situations that are focused on specific and immediate issues.

- The mediator defines a successful outcome as one that is mutually acceptable to the parties regarding a specific set of issues.

- Since basic values that separate the parties are unlikely to be changed, mediation efforts often conclude with a written statement signed by all parties, specifying actions each is committed to undertake (or to cease).

- No action will be taken or strategy employed that depends for its success upon misleading one or more of the parties.

- Information provided on a confidential basis will not be disclosed.

- The mediator will not make public recommendations or reports, unless they have the unanimous support of the parties.

- There will be no votes nor majority/minority opinions.

- Negotiation of the issues will not begin until all parties have made an informed decision to participate.

- The process will be concluded in one of two ways: with a statement constituting a unanimous settlement or with a statement stating simply that agreement was not achieved.

A cost effective and fundamental difference between mediation and other forms of dispute settlement is the common data base from which to make decisions on the individual issues that form the dispute as a whole.

Thinking of the City of Edmonton's painfully expensive process of consultant bashing with respect to a recent annexation, a mediation process may have been established that would have limited the tax dollars spent on fact finding and would have supplied these facts in an atmosphere of non-advocacy for all to discuss. It appears quite certain that a data base assembled in this manner would provide a much higher quality basis from which to make informed decisions. Better decision-making on fundamental issues would likely lead to an optimization of the products of the dispute settlement process itself.

Mediation Agreement

The process of mediaton has one overriding objective; to allow parties in conflict to rationally discuss a dispute through the issues it comprises and to reach agreement by voluntary cooperative means. At the point that the parties in dispute agree that the dispute has been substantially settled, a mediation agreement is signed by all representatives. This document spells out the terms of agreement, resolutions and prescriptions and is then, depending upon the parties and the nature of the dispute, ratified by the represented municipalities or other jurisdictions or parties as required. The Municipal Boundary Secretariat in Ontario has typically dealt with numerous matters in a single boundary dispute. The mediation agreement in a boundary dispute could well include all of the following:

- annexation of lands
- moratorium on future annexations
- planning controls
- cost-sharing agreements
- servicing arrangements
- compensation by annexing municipality
- settlement of assets and liabilities
- phase-in of property taxes for people being annexed
- transitional protection of employees
- representation and elections.

Provision for Alberta Mediation

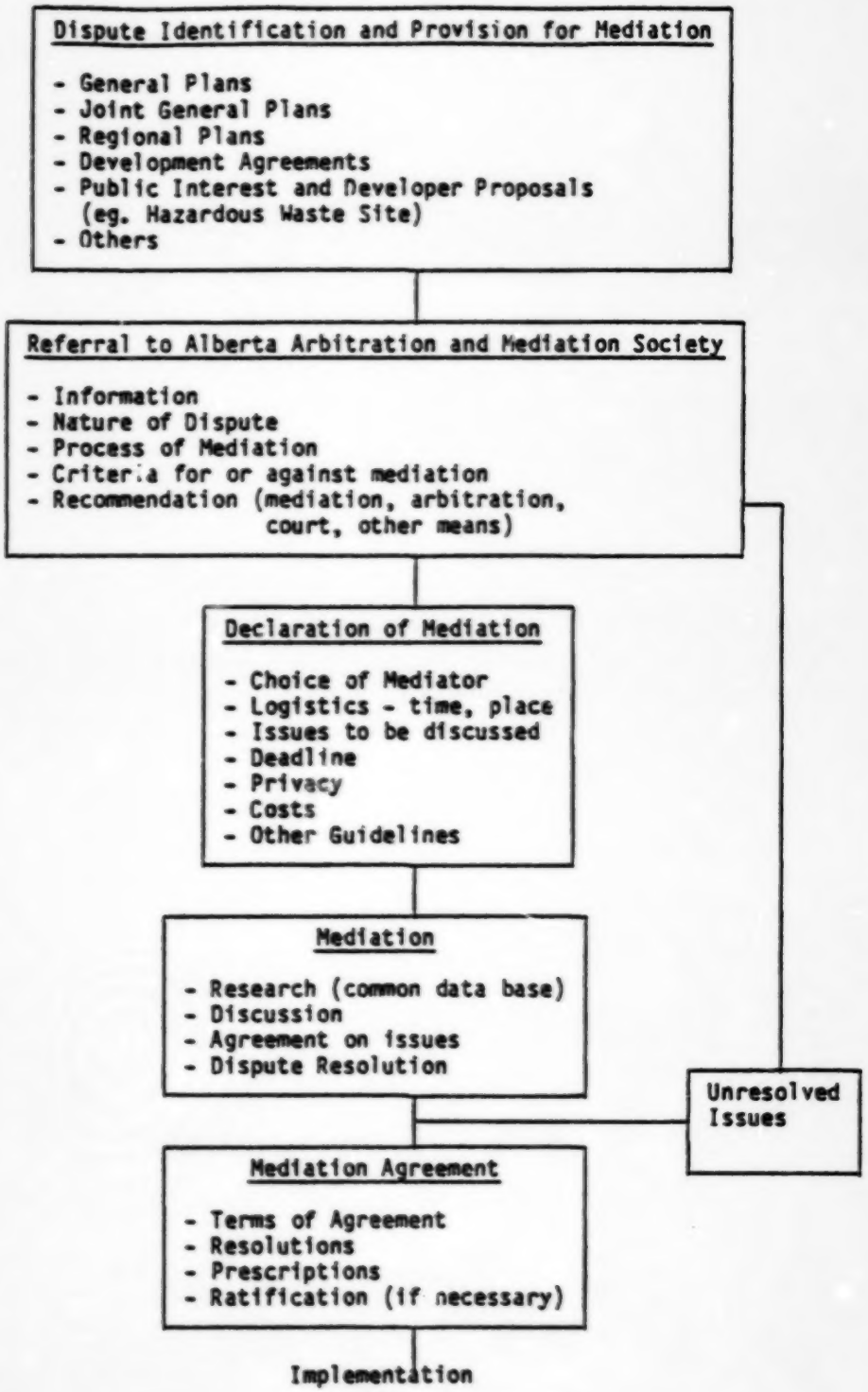
In light of the examples of mediation that we have seen during this seminar, and given the context of planning in Alberta, it is apparent that our several types of plans and agreements with the numerous issues that need to be reconciled within each, allow for the option of mediation either during the process of their development or when other means have failed.

The Alberta Arbitration and Mediation Society proposes, at this time, that in order to allow for this voluntary process to effectuate agreement and reconciliation in municipal and planning matters in Alberta, that consideration should be given to adding brief sections to our planning and municipal documents informing our administrators and public about this important option.

Our planning process is currently one that many have looked toward with respect and admiration for its foresight, substance and intent. The planners in this process and the public to whom they are accountable must be allowed effective methods to carry out the numerous plans and documents required under the Planning Act. Municipal and planning disputes of all kinds should further be recognized as problems to be solved through positive techniques, instead of festering as emotionally charged conflicts with little hope of resolution or satisfactory outcome.

We hope that you will join with us in giving this option your serious consideration.

FIGURE 3. MEDIATION PROCESS FOR MUNICIPAL AND PLANNING DISPUTES



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8. THE ESTABLISHMENT OF THE ALBERTA ARBITRATION AND MEDIATION SOCIETY AS A RESPONSE TO MUNICIPAL AND PLANNING DISPUTES by David Elliott, Co-founder, AAMS

Introduction

Disputes are time consuming, costly, often publicly embarrasing and a drain on physical and mental resources.

If the parties to a dispute are unable to come to a negotiated settlement there are often very few options open to them except to seek redress through the judicial system.

However, often the courts do not provide a satisfactory method of resolving disputes and, in the words of a former President of the Canadian Bar Association,

> "Our judiciary and court facilities now face a burden that dictates an examination of alternative approaches to decision making."

There are other reasons for considering an alternative to court action, they include:

(a) a judge is not chosen by the parties in dispute and so, often, will not have the kind of background and expertise that parties to a dispute might prefer the judge to have;

(b) a judge does not act as a mediator, he must act as a decision maker. As a result potential settlements are lost because the judge cannot act in the capacity of a mediator;

(c) a court is bound by strict rules of evidence which can sometimes prevent what might otherwise be appropriate evidence being presented;

(d) court action is costly and can be enormously time consuming;

(e) court proceedings must be conducted in public. Once a dispute is the subject of court proceedings there is always the spectre of a "winner" and a "loser".

We are not suggesting that the court process is wrong or improper. What we do say is that in any particular case the parties to a dispute may wish to seek an alternative to t-he sort of solution a court produces and the way in which that solution is reached.

The purpose of the seminar is to introduce to you alternative approaches to dispute resolution, systems which can avoid many of the difficulties inherent in a court process.

Mediation and Arbitration

The alternative methods of settling disputes involve processes of mediation and arbitration.

The mediation or arbitration of disputes is not a new process. It has been used formally and informally for centuries. In these days mediation and arbitration is best known for resolving disputes related to labour and management. However, similar concepts can be applied to other forms of dispute.

While this introduction speaks of "mediation and arbitration" almost as a single process each is distincly different in approach and conclusion and the two processes must not be confused.

Mediation

Mediation is a procedure whereby two or more parties in dispute mutually agree to the appointment of one or more independent mediators who attempt to settle the dispute by suggesting alternatives or compromises which might be satisfactory to all the parties in dispute.

In mediation the mediator will only try to resolve the dispute by discussion and attempted compromise. The parties would not agree in advance to be bound by any suggested compromise. If the mediator cannot settle the matter by a compromise agreement between the parties to the dispute the parties are free to pursue whatever other action they wish.

Arbitration

Arbitration involves an agreement whereby the parties in dispute agree in advance to refer a dispute to one or more mutually acceptable independant arbitrators and to be bound by the arbitrator's decision.

The concept to be presented is a readily available system of mediation and arbitration to those involved in the planning process who wish to resolve disputes other than by court action.

Status and Objects of Society

The Alberta Arbitration and Mediation Society is a non-profit Society incorporated under the Societies Act of Alberta.

The objects of the Alberta Arbitration and Mediation Society are stated in its constitution, as follows:

(a) to promote, inform, publicize, communicate and improve the knowledge, application and techniques of arbitration and mediation procedures in the settlement of disputes;

(b) to inform and educate the business, professional, Government and municipal community and the general public in the process and scope of arbitration and mediation procedures and to gather and disseminate information for that purpose;

(c) to institute, support and carry out any research, program or activity with a view to promoting and improving an understanding of arbitration and mediation;

(d) to provide assistance to persons wishing to use arbitration or mediation procedures, including the establishment of one or more rosters of persons who are suited to act as arbitrators or mediators;

(e) to establish facilities and implement procedures for the conduct of arbitration and mediation proceedings.

Activities

Administratively, the Society is divided into divisions: "Municipal and Planning Mediation/Arbitration"; and "Commercial Arbitration". As the membership and expertise of the Society increases we anticipate the activities of the Society will similarly expand and the number of divisions will increase.

Each division of the Society will maintain a list of approved mediators and arbitrators. The mediators and arbitrators will be selected on the basis of their acknowledge expertise and their interest in the process of mediating or arbitrating disputes. It is planned to offer a wide range of experts drawn from private practice, municipal, planning and Government agencies and universities or colleges:

The mediators or arbitrators will attend courses of instruction on mediation and arbitration techniques. A course of instruction is presently being developed.

A major emphasis of the activities of the Society will be on the development of techniques which can be used to resolve issues before the issues actually become disputes. We believe that this can be achieved by the recognition that, in the nature of things, differences of opinion can fester and become disputes. Recognizing that fact we believe that techniques can be developed to ensure that a difference of opinion is the subject of mediation before it becomes a dispute. The earlier that the potential for a dispute is recognised the more likely it is that it can be resolved quickly, privately and satisfactorily by mediation or arbitration.

Voluntary System

Once two or more parties agree to seek a mediated or arbitrated settlement of an issue or a dispute they will have the option of requesting the Alberta Arbitration and Mediation Society for assistance.

We emphasize that, in the mediation and arbitration process, there is no mediation or arbitration unless all the parties to the issue or dispute agree to the mediation or arbitration of the issue or dispute.

The system is entirely voluntary, there is no element of compulsion in the scheme whatsoever. It is available to those who want to take advantage of it. For those who want nothing to do with mediation and arbitration they need not be troubled with it.

If the parties to an issue or a dispute agree to seek a mediated or arbitrated resolution of their differences using the services of the Society they will notify the Society accordingly.

Mediation/Arbitration Proceedings

The Society will provide a list of available mediators or arbitrators to the parties in dispute and the parties will agree on the mediator or arbitrator concerned. When necessary, the Society will arrange for meeting rooms, taking of minutes and related matters.

The parties to the issue or dispute will agree on a basic set of rules, drafts of which will be proposed by the Society, which will govern the conduct of the parties and the conduct of the mediator or arbitrator.

The emphasis on the proceedings will be to effect a speedy resolution of the dispute. The mediator or arbitrator chosen will be committed to as quick a resolution of the matters at issue or in dispute as is feasible in the circumstances.

Cost of Proceedings

The fees and expenses of the mediation or arbitration proceedings will be shared by the parties to the dispute equally or in accordance with any other agreement they may have made.

Voluntary System

The system of mediation and arbitration proposed has one essential ingredient, the voluntary agreement of the parties in dispute to refer their dispute to an independant third party for the purpose of resolving the dispute.

If one party does not want mediation or arbitration then no mediation or arbitration takes place.

Advantages to Mediation/Arbitration

The advantages of mediation and arbitration are:

(a) speed - Mediators and arbitrators will be committed to resolve disputes speedily;

(b) privacy - Mediation and arbitration proceedings will be conducted in private, unless the parties agree otherwise;

(c) choice - The parties in dispute will be able to choose the mediator or arbitrator. They can decide on his or her background and expertise and the number of them;

(d) equity - A mediator or arbitrator can choose the sort of evidence acceptable and has a much wider discretion in considering evidence or using his own background expertise in coming to a decision than has a judge. A decision or compromise can be reached "in equity" without the strictures inherent in court or quasi-judicial proceedings;

(e) cost - The cost of mediation and arbitration will, in most cases, be considerably less than judicial proceedings;

(f) option - Mediation and arbitration are options. Mediation leaves the parties in no worse position than they would be if mediation had not been attempted. If the parties don't accept the mediated settlement they are still free to pursue whatever other alternative remedy they choose.

Mediation and arbitration of planning and municipal disputes can revolutionize the typical adversarial approach taken to disputes and provide a refreshingly simple procedure for avoiding or resolving otherwise bitter and prolonged disputes.

APPENDIX

APPENDIX A

HOW BOUNDARY ISSUES ARE RESOLVED IN ONTARIO

Ontario

Ministry of
Municipal Affairs
and Housing

Hon. Claude F. Bennett, Minister

Municipal Boundaries Secretariat
863 Bay Street
Toronto, Ontario
M5S 1Z2

HOW BOUNDARY ISSUES ARE RESOLVED IN ONTARIO

THE LEGISLATION

Bill 147 was enacted by the legislature of Ontario and proclaimed February 1, 1982 by the Lieutenant Governor of the Province of Ontario.

It is an Act to facilitate Negotiation and Resolution of Municipal Boundary and Boundary-related Issues, known as the Municipal Boundary Negotiation Act, 1981.

The purpose of the Act is to provide a method by which municipalities may resolve annexations, amalgamations or related intermunicipal problems.

All municipalities in Ontario are covered by the provisions of the Act, except a metropolitan, regional or district municipality or the County of Oxford or the area municipalities within those structures unless the issue is of a minor nature. Municipalities wanting to annex an unorganized territory are excluded.

MUNICIPAL BOUNDARIES SECRETARIAT

Its mandate is to administer the Act, provide the resources to carry out fact-finding inquiries on behalf of the Minister, act as facilitators and resolve boundary and boundary-related issues within the provisions of the Municipal Boundaries Negotiation Act, 1981.

THE PROCESS

The process consists of six separate, usually sequential steps, characterized as follows:

1. Orientation
2. Application
3. Fact-Finding
4. Negotiations
5. Agreement
6. Minister's Actions

In certain circumstances, however, one or more steps may not apply; for example, when fact-finding results in an agreement without the need for formal negotiation.

Step 1 Orientation

Municipal Boundary Secretariat staff meet with affected municipalities to outline the boundary-issue resolution process. The staff will also discuss with the municipalities the potential for using the process to resolve a broad range of issues.

Step 2 Application

A municipality that wishes to resolve a boundary or boundary-related issue may apply by by-law to the Minister for the initiation of the process.

Step 3 Fact-Finding

When an application is received, the Minister undertakes to prepare a fact-finding report. The Fact-Finder, a staff member of the Municipal Boundaries Secretariat, meets with the municipal councils, their staff and other affected boards. If it appears that the issues raised by the application are significant, the Fact-Finder's responsibilities are basically as follows:

- list the issues
- summarize the opinions/positions of the affected municipalities

- identify the "party municipalites"
- list pertinent documents
- recommend an appropriate course of action to the Minister.

In some instances the Fact-Finder will discover that all parties have reached a substantial or complete agreement on all relevant issues. Where this occurs, the Fact-Finder can make recommendations to the Minister regarding effecting the agreement without the necessity of proceeding through the negotiation phase.

Step 4 Negotiation

Each council appoints a designated number of council members to sit on the Negotiating Committee. The Negotiating Committee is made up of a balanced number of negotiators on each "side", chaired by a provincial civil servant called a Chief Negotiator.

The Negotiating Committee meets regularly (usually weekly) for several months, following an agreed timetable. The negotiating sessions are conducted in camera and all agreed points are incorporated into a document called the Negotiating Committee's "Recommendation for Agreement." By mutual agreement issues may also be referred to an Issues Review Panel of experts or to an arbitration process.

Step Five Agreement

When the Negotiating Committee has signed the "Recommendation for Agreement," it is forwarded to each party's council for consideration and adoption. The councils may adopt the agreement after a prescribed public involvement or recommend changes based upon the public response and council's concerns, although changes in the agreement must be accepted by all parties. When the "Recommendation for Agreement" is signed, the Chief Negotiator reports to the Minister (and the party municipalities) making recommendations concerning the implementation of the agreement if it is adopted.

Where the Negotiating Committee fails to reach an agreement, the Chief Negotiator reports this to the Minister, together with his recommendations concerning further action. In many cases, a failure of negotiations will result in a referral of the matter to the Issues Review Panel for advice or the Ontario Municipal Board for recommendation.

Step 6 Minister's Action

Where a Negotiating Committee's recommended agreement is adopted by the councils of all the party municipalities, the Minister will usually recommend to the Cabinet that the agreement be enacted into law by means of an Order-in-Council. A similar process may also be followed when the Ontario Municipal Board makes recommendations in response to a referral by the Minister, in cases where the parties have failed to agree.

In cases where no agreement is forthcoming, the Minister may, in response to the report of the Chief Negotiator, involve the Ontario Municipal Board, or an Issues Review Panel, or the application may be terminated or referred back for further negotiation.

PUBLIC CONSULTATION

There are three opportunities for public involvement in the process.

- During the fact-finding public opinions are sought and concerns noted.
- After a "Recommendation for Agreement" is signed the party municipalities hold information meetings to inform the public of the details.
- Before implementation, the Province allows a 28-day period to receive formal objections.

ISSUES REVIEW PANEL

This is a panel of experts in municipal affairs. The panel may be constituted to provide impartial advice on issues that might be referred to it during negotiations.

The Chief Negotiator and the party municipalities each nominate a representative to form the panel.

The Minister of Municipal Affairs and Housing, the Chief Negotiator or the Negotiating Committee may submit issues to this panel.

TYPICAL ISSUES FOR NEGOTIATION AND POTENTIAL ELEMENTS OF AN AGREEMENT

While intermunicipal negotiations are often initiated when one municipality desires to annex land for a specific purpose such as industrial or residential development, the legislation provides for developing agreements on a much broader range of issues that may or may not include annexation. These can include such matters as planning policies, cost-sharing arrangements and servicing issues.

The typical elements of an agreement that can result from negotiations of the foregoing issues can include provision for such matters as:

- annexation of lands
- moratorium on future annexations
- planning controls
- cost-sharing agreements
- servicing arrangements
- compensation by annexing municipality
- settlement of assets and liabilities
- phase-in of property taxes for people being annexed
- transitional protection of employees
- representation and elections.

BASIS OF PROVINCIAL/MUNICIPAL COST-SHARING OF PROCESS

	Provincial	Municipalities
. Studies, consulting fees	50%	50%
. Office, meeting accommodations, printing, secretarial support, Issues Review Panel fees, Provincial computer time, published notices	100%	nil
. Municipal Council costs, staff salaries, pre-application studies, lawyers' fees, advertising	nil	100%
. Provincial staff salaries and expenses	100%	nil

DEMANDS ON MUNICIPALITIES

Municipal councillors must be prepared to commit a significant amount of time as well as staff resources to reach a negotiated settlement. At the political level other members of council may have to assume a heavier workload to relieve those who are involved in the negotiations. Time demands on staff can mean that other responsibilities may suffer.

There are financial implications to the foregoing as well as the municipalities' share of other costs, all of which should be budgetted for.

COMMENT ON PROCESS

Using the negotiation techniques of the labour relations field, the Act provides for council members of two or more municipalities to discuss and devise solutions to their boundary and boundary-related problems.

One of the strongest arguments for having municipalities negotiate their differences is a philosophical one. One of the participants in the Brantford-Brant Pilot Project expressed it this way: "If a solution can be arrived at by people held accountable for that solution, that is preferable to one determined by a disinterested individual or panel....It is the elected politician who is responsible for governing his community. In a negotiated settlement, that person can be held accountable for his decisions."

POOR

QUALITY

ORIGINAL